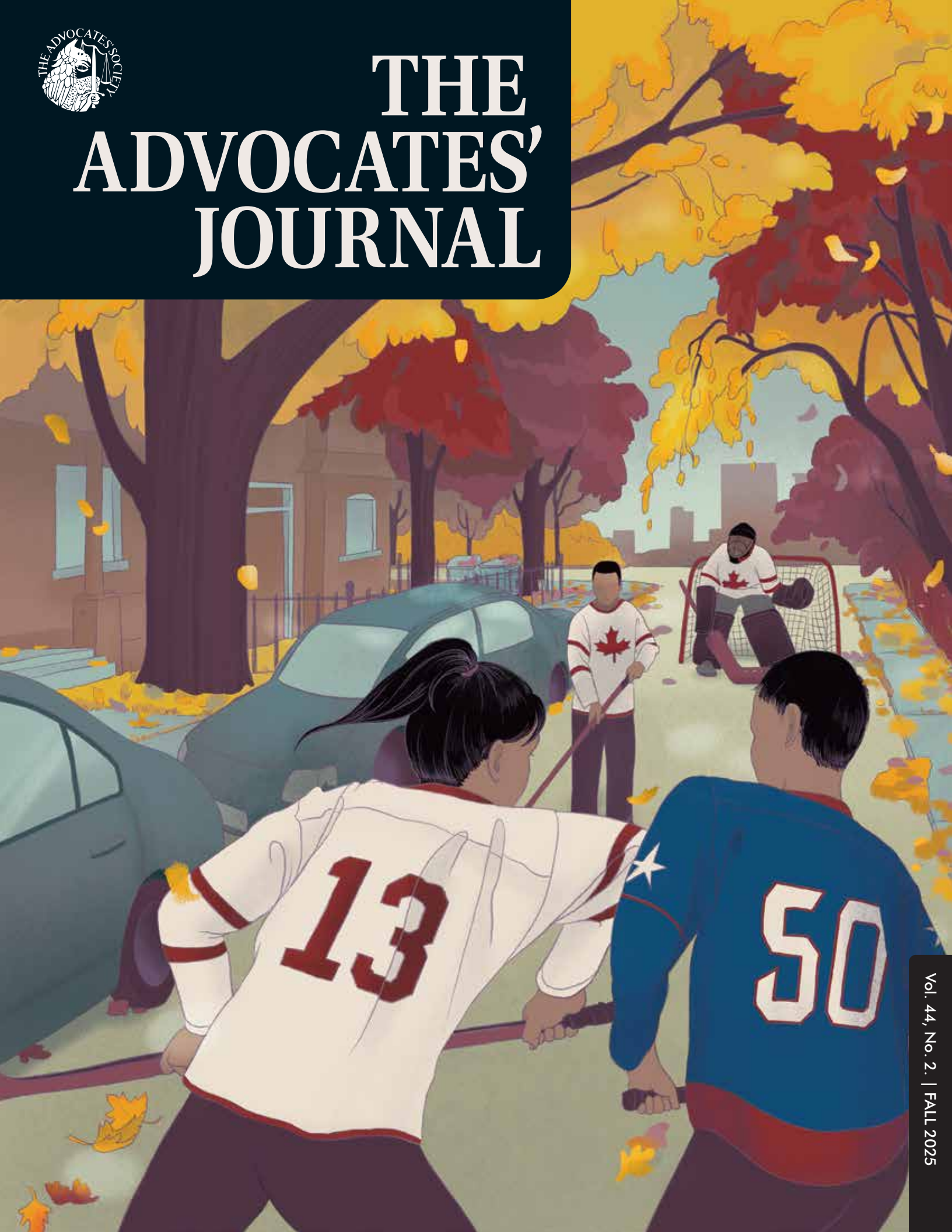
THE ADVOCATES' JOURNAL



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The emotions of advocacy

Linda Rothstein, LSM, ASM

"You would cry too
if it happened to you."
~ Seymour Gottlieb, Walter Gold, John Gluck Jr., and Herb Weiner, "It's My Party"

Some readers may have heard me tell a story from my early years at the bar. It took place in the days when late nights of work were at the office, not at home. Add an overwhelming file. An unhappy (well, angry) client. A deadline the next day and no one else to dig into the issues. A bucket of demands at home, too.

Eventually, the inevitable flood of tears.

A male partner – good guy, senior guy – saunters into my office.

"Linda, you work very hard."

"Yes," I say.

"You are here lots of nights."

"Yes."

"Right. I'm just down the hall, and it seems you are finding things very difficult."

I nod.

"You cry sometimes."

I nod again.

He nods.

"Well, next time, Linda, when you're feeling like that, close the door."

For a very long time I thought that male advocates never cried. Not so, it turns out. For the record, the only two counsel I have ever seen cry during a trial or a hearing were men – both apparently brought to tears by the rhetorical power of their own submissions. True story.

I now know that a career in advocacy requires a lot of work navigating the emotions of lots of people, not just our own. I now know that female advocates are not less in control of their anger and fears than our male colleagues are. We just don't call men "emotional" when they lose it.

All good advocates struggle with the emotional toll of what we do: the unpredictable thunderstorms of opposing counsel; the high anxiety and despair of our clients; frustration, then exasperation, with the judge and, of course, sometimes from the judge. And always, hanging over even our very best work like a sad, grey cloud, "winning is never as good as losing is bad."

After he left the Supreme Court of Canada, even the great Ian Binnie fessed up to the burden of it all. Some years ago, he told a gathering of advocates that when he was counsel, his personal recipe to manage the deep funk of losing a case was "to allow myself one night, maybe two in the case of real catastrophe, to curse the darkness while lying on the floor listing well-founded grievances against both the judge and my opponent."

Why is this worth saying?

A few reasons.

We need to dispel the illusion that senior advocates just sailed through. Or the myth that women, particularly younger women, aren't cut out to be advocates or that they are failing because their emotions are sometimes more visible. But this is not an invitation to let it

"all hang out" in the name of authenticity. Yes, that senior guy could have offered me a shoulder or at least some office privacy. But he taught me that there's a time and a place for our emotions.

Acknowledging that strong emotions are inevitable in what we do is the first step to developing the emotional intelligence that is so important to doing it well.

The best advocates I know are good listeners; maybe not when they are in full flight, but always when they need to be. They are good at connecting with a client, particularly when the client is in distress and the advocate is eliciting information that the client is reluctant to share or providing the client with some comfort when no legal alchemy can set the matter right. These same great advocates are also in tune with the other side's issues, concerns, and thinking – even when opposing counsel is exceedingly difficult, or worse.

I would argue that these skills are particularly important as the world around us spills ever-increasing amounts of emotional rhetoric into our professional and personal lives; a world in which rage is too often celebrated over reason, and people form positions on complicated sociopolitical issues untethered to facts or evidence or ethics.

There are lots of ways to fight demagoguery and populist marauders, but one of the best ways I know is to double down on what we advocates do best – pursue our clients' interests with zealous advocacy *and* civility. Practising civility requires managing the emotions of advocacy.

Civility should not become a relic of a kinder, gentler time. Justice Renee Pomerance chose civility as the topic for her keynote address to the Essex Law Association in Windsor, where she began her career. Her deconstruction of civility's core values makes clear that now, perhaps more than ever, civility is essential to our adversarial system. The Journal features an edited version of Justice Pomerance's speech. It's a must read.

We also have an article with important insights on the role of counsel at mediation, from a mediator who spent his days watching counsel in action; an arithmetic analysis (you read that correctly) of the optimal length of your opening words in the SCC (no pressure, folks); a class action litigator's assessment of the access to justice issues in cases of institutional abuse; practical advocacy lessons for cross-examinations conducted outside the courtroom; and a much-needed guide to good insurance habits.

Finally, a shout out to two readers who each took the time to write a letter to the editor about our last issue of the Journal and its focus on the rule of law. We love to publish your letters, dear readers. Please keep them coming.

THE ADVOCATES' JOURNAL SUBMISSION GUIDELINES

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

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Letters to the Editor

Dear Editor:
Re: Summer 2025 (44:1) Journal

I have read with great interest, and no small degree of alarm, your editorial, "Dark Clouds." Accurate and insightful as your observations are, all lawyers have an obligation to loudly echo your comments. The subject matter is of course "touchy," but you have had the courage to raise it. Kudos.

While lawyers in Canada can in fact look at the legal and judicial goings on south of the border and congratulate ourselves that we are at least not experiencing the same things, a deeper analysis might well challenge that conclusion. For we, too, have our own rule of law issues. Ours may be more oblique, but by the same token they may be more insidious, too.

Whether it is the fact that the *Youth Criminal Justice Act* has been an abysmal failure, with out-of-control young people roaming our streets to engage in fits of violence and mayhem not seen even half a decade ago; whether it is the chronic underfunding of our courts and judges, leading to extraordinary access-to-justice delays; whether it is the predomination of criminal justice (public law) at the expense of any real access to civil justice (private law); or whether it is the dramatic proliferation of self-represented litigants – the security and social predictability that the rule of law could once be counted on to provide is truly slipping away. And no one seems to care; at least no political leaders seem to care. The construction of new court facilities has slowed to a trickle, and the filling of judicial vacancies often receives no political priority at all. Most judges I know are working their guts out; and even at that, they are not keeping up, or certainly not in the manner they would prefer.

Just in my own practice, I was recently gobsmacked to learn that a six-month trial I have pending cannot be heard until 2028. If I survive until then, I will be an old man, with dotage perhaps not too far away. The precipitating incident was in 2019. The action was commenced in 2020. Documents were produced years ago. Discoveries are virtually complete. To try to explain it all to my client is an exercise in folly. How can any lawyer possibly make such access-to-justice facts make any sense at all?

To borrow an unfortunate phrase originally from south of the border: "It is all broken." And that is worse than Professor Dodek's "depression," as applied to the current practical prominence of the rule of law; and a more than haunting reminder of Mr. Gover's thesis that the evaporating influence of the rule of law can have a damning effect on the market economy which the broader society requires to survive.

Back in June 2024, I attended Nova Scotia's main bar admission ceremony in Halifax. There, the Honourable Justice Christa Brothers, a well-liked and deeply respected member of the Supreme Court of Nova Scotia, gave pause to remind the admittees that with their great privilege comes great responsibility: to use the law wisely to ameliorate difference, to support equality and broad social advancement, to volunteer just to make society better overall, and to be true to principles such as social justice for all. But the Justice's underlying message was that the rule of law is facing challenges and is being assaulted by many; and that the rule of law's respect from the past must be continued into the future. For there is really no other way.

Gavin Giles, KC (He/Him/His)
McInnes Cooper
Halifax, Nova Scotia

Dear Editor,

I'm sure we've all read and seen the recent remarks by Premier Doug Ford criticizing the judiciary in Ontario. There's a lot we can challenge, given our professional experiences and knowledge.

1. There would be no meaningful benefit to an overhaul of the judicial appointment process to provide for election of judges. As we've seen in the United States, that would not improve the quality of justice, as it allows for unseemly election ads – potential for undue influence by those who would fund candidates' campaigns and leave it to the electorate to determine who would be responsible for the administration of justice.
2. The fact that a Superior Court judge didn't let Premier Ford proceed to remove bike lanes (notwithstanding that, unlike the premier, the judge received no votes) is entirely in keeping with the separation of responsibilities between the executive and judicial branches. Our courts are a critical component of a strong democracy, providing us with protection against unconstitutional exercise of executive power.
3. In most cases, justices of the peace (who are appointed provincially), not judges, make decisions on bail. While the *Criminal Code* provides the basis upon which issues of bail have to be determined, provincial Crowns can apply for reviews of any wrongful decisions to release accused persons.
4. We do *not* have, as the premier put it, "a lot of terrible, terrible bleeding-heart judges." We have dedicated, independent judicial officers who make a consistent effort to apply the law as they understand it. And again, a decision to acquit someone or impose a sentence the Crown feels is inadequate may be appealed.
5. Behind what I feel is the colourful smokescreen put up by the premier is the real cause for concern. Not only has he stated on multiple occasions that he wants to appoint "like-minded" judges who are "tough on crime," but over time he has put himself and his government in the position to do exactly that. Not satisfied with changing the constitution of the Judicial Appointments Advisory Committee (JAAC) to give the Attorney General more representation and control (the AG appoints 7 out of 13 and, since 2021, gets to determine whether or not to accept the three committee members proposed by the Law Society of Ontario, the Ontario Bar Association, and the Federation of Ontario Law Associations), he now plans to require the JAAC to "consider" the guidelines provided to them by the AG in evaluating candidates for future appointments. In addition, on the claim it will speed up the appointments process, there will now be a "pool" of candidates recommended to the AG, not just six and not just those who are "highly recommended."
6. I recognize that there have been many fine individuals appointed, but over the past few years the disproportionate selection of Crown attorneys results in an underrepresentation of members of the defence bar. Some of my cynical colleagues have expressed the view that the road to an appointment will require them to seek jobs as Crowns.

Your words of encouragement for us to use every effort to inform the public of this very real threat to the *Charter*-protected right to a fair and public hearing before an independent and impartial tribunal must be heeded. It is not only timely (and perhaps even urgent), it's incumbent on us to do so. Given his history, that's the only way we might get the premier to abandon his efforts to control this essential part of our administration of justice.

Jeffrey Manishen
Ross & McBride
Hamilton, Ontario

It costs nothing but buys everything: In praise of civility

The Honourable Justice Renee M. Pomerance

This is an edited version of the keynote address delivered at the Essex Law Association General Meeting, May 4, 2024.

I begin with a riddle: What costs nothing but buys everything? The answer is civility.

Does it cost nothing? My late father used to say, "Renee, it doesn't cost anything to make someone feel good." He was quick to compliment others, and to uplift people with his words and his sense of humour. This quality earned him a great number of friends and admirers.

Although I like to speak about my father, I mention this memory now because he is proof positive that nice guys don't finish last. My father's approach was warm and inclusive, and he had no end of entertaining stories. He knew how to win friends and influence people – just like in the title of that old Dale Carnegie book, which I will come back to shortly. For many years my father ran a retail business, where his approach was front and centre every day. His customers responded with decades of loyalty.

Being nice cost him nothing – yet it bought him a lot. I refer here not to business income, but to the friendships and human connections that he cultivated over his lifetime. One could say that my father practised civility.

Of course, that word is commonly used to describe what we aspire to in the legal profession. It is civility that permits our judicial system to operate, to facilitate the orderly resolution of human disputes by human arbiters. I use the word "human" not merely to distinguish ourselves from artificial intelligence – that is another topic for another day. I reference being human because that represents both the strength and the fallibility of our justice system. Our human quality is what makes us fallible, but it also makes us uniquely suited to address and resolve human problems. I also observe that the word "human" shares its Latin root with the word "humane." Human is defined as "of or belonging to people," while humane is defined as "philanthropic, kind, gentle, polite; learned, refined, civilized."[1] The relationship between these concepts suggests that civility is intimately tied to the status of being human.

However, civility is not the only characteristic of human nature. Some may argue that civility does not come naturally at all – that we are at base not civil creatures. The carapace of civility fell rather quickly in William Golding's novel *Lord of the Flies*, a tale in which young boys were left to their own devices without external constraints. I am not a philosopher and am not equipped to debate the state of nature. Suffice to say, we can probably all agree that there are moments when we are tempted to be less than civil. There is good reason to resist that temptation. Again, civility costs nothing but reaps many rewards.

There are those who argue that civility is the enemy of zealous or effective advocacy. I suggest that nothing is further from the truth. Civility is not just consistent with good advocacy. Civility *is* good advocacy. It is persuasive. Trust me on that. Your credibility will soar if you maintain a civil stance and refrain from taking the bait when your opponent responds differently.

Courtroom advocacy is a unique form of human interaction because it is, by definition, focused on areas of disagreement. Yet, we aim for an approach that is not, itself, disagreeable. We have rules of engagement of various kinds. We aim for civility. We codify that objective in various ways – including through professional rules of conduct.

What, then, are we really speaking about? What is civility? Civility has been defined in various ways. It has different, sometimes conflicting, elements. For example, civility is sometimes equated with politeness. That is one aspect of civility – compliance with a set of accepted social norms. Politeness is etiquette. It is manners. It is technique. It is external. And it is tone. People still refer to Emily Post's treatise[2] on etiquette – though the world has changed considerably since she put pen to paper. (The whole concept of paper has become passé.) But many of those norms and conventions are still apt. One commentator suggested that all of Emily Post's rules can be reduced to one overarching principle – that one must try not to make others uncomfortable.

A story – perhaps an apocryphal tale – is sometimes told to illustrate this principle. It is said that Queen Victoria was a stickler for protocol and ritual. One evening, she invited a foreign dignitary to her home for a state dinner. After everyone took their seats, the dignitary did something unthinkable. He took the bowl in front of him, intended for washing the fingertips, raised it to his lips, and drank it like soup. The other guests were aghast at this social faux pas. As everyone stared at Queen Victoria, wondering what she would do, she took her own bowl, raised it to her lips, and drank it like soup. Dining etiquette was important, but not as important as making her guest feel comfortable.

While politeness is an aspect of civility, it is but one aspect of it. That is because politeness has a dark side. Norms and rules can be used by the powerful to oppress the powerless. Politeness can be used to mask egregious disrespect. Politeness suggests that we not rock the boat – that we silently acquiesce to the status quo. But civility is also about public-mindedness, about treating others as free and equal members of society. It is about more than an external pattern of conduct. It is about an attitude of respect for others. Moral civility goes beyond politeness. Sometimes it demands a departure from politeness.

Moral civility demands that we respect other people's fundamental rights and liberty. Respect may require that we make someone uncomfortable. If, instead of sipping from her finger bowl, the dinner guest had offered a racist or sexist or other discriminatory statement, then one would hope Queen Victoria would not have let that slide – that she would have spoken out against that type of speech. In that instance, civility might make her guest uncomfortable, but civility in the broad sense would call for something other than being polite.

Similarly, civility must allow for disagreement – even vehement disagreement. The objective of civility is not to make everyone feel comfortable. It is not about appeasement, or silence, or yielding to positions that do not seem right. It is about registering disagreement in a less-than-disagreeable way. In this regard, I commend the definition of civility offered by Dr. Carolyn Lukensmeyer, the executive director of the National Institute for Civil Discourse in Washington, DC. As Dr. Lukensmeyer put it, "Civility does not mean appeasement or avoiding important differences. It means listening and talking about those differences with respect."[3] This is how a healthy democracy operates – through respectful engagement.

This, I suggest, is precisely what we strive for when we speak of civility in the legal profession: respectful engagement with clients, with opposing counsel, with the court, with court staff (may I observe that nothing invokes the ire of a judge quite like disrespect aimed at court staff), and, quite frankly, with everyone, whether or not they show you the same courtesy. It means respectful engagement inside and outside the courtroom, whether it involves correspondence, emails, texts, or a note hurriedly written on the back of a napkin.

US Supreme Court Justice Warren Burger said that civility is the social lubricant that distinguishes the courtroom from a barroom brawl. He believed in the importance of teaching civility in law schools, saying, "[L]awyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice."[4]

Have we seen a general decline in civility in the legal profession? At least in some quarters, the answer is yes.

What is the cause of this decline? I suggest it is at least in part a function of the world we live in, which presents both benefits and challenges. One of the biggest transformations is the digital revolution. It has completely changed the way we correspond with one another.

At the risk of showing my age, I was called to the bar in the 1980s. Google was hardly a word, let alone a verb, and Amazon was a rainforest. When I began practising law, there was no computer on my desk, there was no email, there was not even a fax machine in the office. I think that I had, by then, progressed from 8-track tapes to cassettes, but I cannot be entirely sure. The upshot was that correspondence with opposing counsel took a bit of time. I would handwrite a letter, and a secretary would type it. I would then read the typed copy for content *and for tone*. I would revise in handwriting, receive the next draft, read it for content and tone, and, when finalized, the letter would be sent by snail mail or, if time was of the essence, by courier.

I am not suggesting that we return to the glacial pace of mail delivery. But there were advantages to pausing, reading a hard copy of a letter, and thinking about not only what it conveyed, but also how it conveyed content. Even the fax machine – now a quaint device, but at the time a revolutionary means of almost instantaneous delivery – led to more precipitous exchanges. I recall the first day our office had a fax machine. I was a junior on a highly contentious criminal trial. Various letters had been faxed back and forth, fast and furiously, emerging from the machine on waxy paper that was eventually going to turn into ashes. The last piece of correspondence came from defence counsel announcing that "it would appear that we have nothing more to say to each other." It seemed odd to me that, if there was nothing to say, opposing counsel had to say it, but that letter was sent in the heat of the exchange. (In fairness, I expect that our correspondence emanated heat as well.) The point to be made is that we did not take as much time to review letters when we knew we could send them – and that they'd be received – almost immediately.

You know where I am going with this. Fast forward to a world where email and text communication allow for rapid-fire,

almost-instantaneous, transmission of content that may not even contain full sentences. There might be a temptation to write something aggressive or combative in a moment of anger or frustration. It is far too easy to hit "send" immediately after doing so. Consider the wisdom of a pause. Not a snail mail kind of pause, but a pause that allows you to print out the email and consider it for content and tone before hitting the irreversible send button. If something was written for catharsis, it will usually be best left on the cutting-room floor.

What about conduct within the courtroom? It is here that civility is particularly critical, though the aspiration is not always the reality. Consider, for example, the observations of Justice Chang in *China Yantai Friction Co. Ltd. v Novalex Inc.*,[5] where he memorialized the lack of civility on the part of counsel:

Counsel's conduct during the application hearing

> [20] During the application hearing, counsel for the applicant somehow decided that it was appropriate during opposing counsel's submissions to express themselves by way of, among other things, eye rolling, head shaking, grunting, snickering, guffawing and loud muttering. This behaviour culminated in one of them leaning back in his chair, throwing both hands in the air and laughing in a gleeful moment of triumph during a particularly engaging exchange between opposing counsel and the bench. Apparently, applicant's counsel felt that he had scored some major point during my questioning of the respondent's counsel and wanted to ensure that everyone else was aware of that victory.
>
> …
>
> [22] Unfortunately, the behaviour engaged in by applicant's counsel is neither a new nor a rare phenomenon. Too often, counsel seem to believe that enthusiastically attempting to disrupt and/or demean opposing counsel during the latter's oral submissions is one of the hallmarks of an effective advocate. It is not. Too often, counsel seem to believe that "rolling eyes, dancing eyebrows and other mannerisms" … whilst opposing counsel is making submissions to the court constitute proper critique or response to those submissions. They are not.

The decorum associated with court proceedings is not about pomp and circumstance. It is a recognition of the solemnity of the occasion – of the fact that decisions are being made that can dramatically affect the trajectory of people's lives. Litigation is not supposed to be a tea party, but it shouldn't resemble the finale of *Game of Thrones*, either. The key, to reiterate, is respectful engagement. The courtroom is a public forum. Members of the public, including the litigants, are often present. The courtroom is the face of justice within the community. It is a place where justice must both be done and be seen to be done, where everyone is heard who should be heard, and where all are treated with dignity and respect.

Here again, technology has had both a positive and a negative impact. Zoom is a platform on which we hold many court hearings. The use of virtual platforms facilitates access to justice in an efficient and cost-effective way. At the height of the COVID-19 pandemic, videoconferencing was key to offering any access to justice. But many have observed that the decorum of court is far more difficult to maintain in virtual hearings. It is difficult to replicate the solemnity of the courtroom when a party or a witness is wearing pajama pants and holding a "world's greatest dad" mug. When lawyers appear in moving vehicles or while sipping wine or dressed in beach attire, the dignity of the proceedings starts to slip away. And dancing eyebrows are even more visible on Zoom.

Leaving aside the notorious Zoom gaffes, like the infamous cat filter that wouldn't budge, I suggest that virtual hearings can breed incivility because they are steps removed from in-person encounters. Though I have no empirical data, I am willing to wager that it is more difficult to be uncivil to someone when they are physically present. It is as though those little black boxes offer a shield of sorts – a gauze of protection from accountability. We certainly see that in other internet contexts, where cowardly trolls are emboldened by the mask of anonymity.

The pandemic also had the potential to perpetuate feelings of isolation among members of the legal profession, many of whom were sitting in a basement or a home office when they appeared – without the benefit of colleagues down the hall. A cohort of lawyers and judges assumed their new roles during the pandemic. The return of in-person proceedings was welcomed for a number of reasons, among them the intangible, but very real, benefits of being in the same room as others. There is a reason that settlement often takes place on the courtroom steps. What happens in person is fundamentally different from what happens on a telephone or computer screen.

In-person communication also helps to foster mentorship within the profession. Mentorship is the mechanism by which one generation of lawyers passes its wisdom on to the next. There are various rules of courtroom etiquette that are bred in the bone when one articles and begins to practise under the tutelage of those more experienced. When I was called to the bar, I sensed that mentorship was the rule and not the exception. So many of us had the benefit of learning from generous and wise lawyers who served as role models and provided opportunities to learn. Some of the important lessons cannot be found in the case reports. Part of mentorship is teaching civility – what it is and how to practise it on the ground, in the cut and thrust of active litigation.

If there is a mentorship problem, there is also a solution. I suggest that those who seek a mentor pick up the phone and call someone you trust and admire. Ask if you can meet over coffee. Ask if they will serve as a mentor. Many folks will be flattered by the approach and happy to oblige. For those who are senior and experienced, reach out to younger colleagues to offer counsel and advice. Cultivate relationships within the profession. Those who are adversaries in the courtroom should be able to sit across a table from each other when the day is done.

Of course, this is not just about lawyers. I would be remiss if I did not refer to the importance of civility on the part of judges. Judges set the tone in the courtroom. If we expect others to be civil, we must be civil. If we expect others to be on time, we must be on time. We have credibility only if we model the behaviour that we demand of others.

I say all this recognizing that there will be heated moments in court. I do not believe that anyone gets up in the morning, looks in the mirror, and says, "I plan to be obnoxious today." At least, I hope not. The mistakes happen when the emotion of the case overwhelms the rationality of the participants.

In *Doré*, the Supreme Court considered the conduct of a lawyer who wrote an incendiary letter to the judge hearing his case. The letter – to cite just a few of the accusations – accused the judge of being "loathsome," arrogant, and "fundamentally unjust"; of "hid[ing] behind [his] status like a coward"; of having a "chronic inability to master any social skills"; of being "pedantic, aggressive and petty in [his] daily life"; of having "obliterate[d] any humanity from [his] judicial position"; and of having "non-existent listening skills."[6] Not surprisingly, the Court found that the norms of moderation and dignity were overstepped. What I wish to highlight is a passage in which the Court set out a blueprint for civility in the legal profession:

> Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.[7]

This passage so eloquently captures the balance that we aspire to.

In the last segment of my remarks, let me leave the legal profession and speak about human interaction and discourse more generally. I do not propose to speak about any political issues, or world events that spawn them. However, with the proliferation of social media, increasingly divisive issues, and polarization of public debate, we are engaged in a war of words that can result in its own breed of casualties and collateral damage. The internet is an echo chamber: People are generally presented with viewpoints that coincide with their own, rather than a full marketplace of ideas. Strong divisions pull people in different directions and challenge any hope of consensus.

In his TED Talk "3 Ways to Practice Civility" Steven Petrow called for a convention to govern our rules of discourse:

> So, today, we are engaged in a great civil war of ideas and identity. And we have no rules for them. You know, there are rules for war. Think about the Geneva Conventions. They ensure that every soldier is treated humanely, on and off the battlefield. So, frankly, I think we need a Geneva Convention of civility, to set the rules for discourse for the parameters of that. To help us become better citizens of our communities and of our countries.[8]

The legal profession already has what you might call a *Geneva Convention* of civility: the rules of conduct that govern the legal profession. We have a template that governs how we deal with some of the most contentious disagreements within society – those that cannot be resolved by the parties themselves. We have guidelines for respectful, empathetic debate and discussion of issues that sometimes strike at the heart of our society and, at the very least, are a focus of the litigants' lives. These rules of engagement may have a place outside the legal profession. They may offer signposts of civility for other forms of social discourse, whether they occur in boardrooms, at retail shops, in lineups, around the dining-room table, or wherever there may be differences of opinion.

These signposts include:

- letting each other speak, and listening respectfully;
- refraining from personal attacks;
- refraining from intemperate language;
- taking a moment before reacting with emotion;
- identifying areas of concurrence in order to narrow the scope of dissent;
- stepping outside one's own perspective to imagine what the opposing view might say; and
- treating others with the courtesy that we would wish to receive ourselves.

After all, it is through these discussions – these healthy disagreements – that we learn and grow and consider alternative points of view. We owe it as much to ourselves as we do others to engage respectfully. Civility breeds human connection. If that doesn't move you, remember that civility is always more effective than its counterpart.

Earlier, I referred to *How to Win Friends and Influence People*. Some time ago I was in an airport bookstore looking for something to help me pass time on a flight. I saw a copy of this well-known book by Dale Carnegie. I am a bit embarrassed to tell you that I bought it. In my mind the title was something of a cliché – a hackneyed expression. I was curious to see how social mores had changed since the book was originally published. But it was not just a collection of outdated folk wisdom. It was also a book of wisdom that still resonates in the modern era. Dale Carnegie offers advice for navigating conflict in a variety of professional and social contexts. What he offers is a recipe for civility as a tool of persuasion. The book is dated, but the advice is timeless.

In closing, let me return to my father's economic formula. It costs nothing to make someone else feel good, or to be respectful, or to offer an opposing view that is free of personal invective or gratuitous attack. This may be the one economic formula that is not altered by the rate of inflation. Civility still costs nothing. And it still buys much of what we so desperately need in a healthy but vibrant democracy.

Notes

1. Douglas Harper, *Online Etymology Dictionary* (2025), sub verbo "human"; Etymonline: https://www.etymonline.com/word/human.
2. Lizzie Post and Daniel Post Senning, *Emily Post's Etiquette: Manners for Today*, 19th ed (New York: William Morrow, 2017).
3. Dinner Table Debates, "What Is Civil Discourse?" https://dinnertable-debates.com/what-is-civil-discourse.
4. "Excerpts from the Chief Justice's Speech on the Need for Civility," *The New York Times* (May 19, 1971).
5. 2024 ONSC 608.
6. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, at para 70.
7. *Ibid* at para 68.
8. Steven Petrow, "3 Ways to Practice Civility" (TED Talk, January 2019), at 00h:13m:14s, online (video); https://www.ted.com/talks/steven_petrow_3_ways_to_practice_civility/transcript.

The appropriate role of counsel at mediation

Stephen Richard Morrison

In the Fall 2019 issue of *The Advocates' Journal*, I wrote about the art of writing an effective mediation brief, and in the Winter 2024 issue, I discussed the importance of preparing your client for a successful mediation. In this, the third and final contribution in a series, I offer what I hope will be useful advice from a mediator's perspective on the proper role of counsel during the mediation session itself and, more particularly, some practices to avoid.

By the time you attend with your client on the day of the mediation, you will presumably have delivered a concise and effective mediation brief demonstrating your client's sincere interest in resolving the dispute in a reasonable way, rather than an aggressive, provocative, and overly adversarial restatement of your statement of claim or defence. Moreover, you will have made an appropriate effort to prepare your client by reinforcing the motivations for compromise, by providing an overview of what to expect from the mediator, and by ensuring that an individual with the authority to settle is in attendance. All these efforts may be for naught, however, unless you are able to doff your litigator's hat and don your mediation counsel's cap for the duration of the mediation session.

Mediation is not primarily an exercise in advocacy. Success does not depend on mastering the rules of evidence, familiarity with substantive law, skilful cross-examination, or the presentation of legal argument. As a result, the competencies required of counsel in achieving an acceptable mediated settlement are entirely different from the finely honed adversarial skills required for success in the courtroom.

Nor do mediated settlements typically reflect justice or legal correctness. Rarely will either party regard a successful mediation outcome as fair or reasonable. While the old idea of achieving "win-win" results is appealing, mediated settlements are rarely perceived as such by the parties. Most likely, a settlement will be seen, at best, as a pragmatic alternative to a risky and expensive process carried out in what many regard as a "broken" system. To achieve this result, both the client and counsel must come into the process attuned to the reality that significant compromise will be required.

When mediating, I often try to acclimatize claimants to the extent of compromise that will be necessary by referencing the differences between *claim value*, *net realistic judgment value*, and

settlement value. The first – *claim value* – refers to the often exaggerated and rarely achieved amount set out in the statement of claim. Next, *net realistic judgment value* refers to counsel's genuine estimate of what a court is likely to award to the plaintiff and after considering the various risk factors associated with the claim merits and the availability of cogent witnesses and documents to prove the claim, *net of the portion of the legal costs that will be unrecoverable*. Unlike claim value, net realistic judgment value is the measuring stick against which *settlement value* must be considered.

I then explain that, in the strongest cases involving plaintiffs who are well able to absorb the costs of litigation, *settlement value* achieved at mediation rarely exceeds 70 or 75 percent of *net realistic judgment value* and, in less meritorious cases or with plaintiffs unable to bear the financial burden of ongoing litigation, *settlement values* can be substantially lower, even as low as 25 to 30 percent. In essence, it is a bell curve, not a rainbow with a pot of gold at the end. This is often a difficult but necessary discussion to have in the interests of resetting any unrealistic expectations. While it is appropriate for you, as counsel, to assist your client in moving up that curve as much as possible, it is equally important that you avoid setting your client up for disappointment.

I will now address several situations where, in my view, counsel does a disservice to a successful outcome at mediation, assuming the client has a serious interest in achieving a settlement. Of course, if your client has no interest in a compromise settlement and is simply going through the motions of participating in a contractually required or mandatory mediation under the applicable rules of court, then most of what follows will be of little relevance.

Avoid adopting an adversarial stance with the mediator

Most commercial mediators today have largely abandoned the practice of inviting opening statements from counsel during an initial plenary session. It is largely seen as a waste of time and likely to give rise to little more than the restatement of disputed facts or legal positions. Rarely does it serve to diminish the inherent bad will that often exists between the parties coming into the process. It may make the situation worse. As a result, denied the opportunity to demonstrate their advocacy skills to the opposing party, many counsel feel the need to take a strong position in the private caucus sessions, perhaps hoping that the mediator will convey a strong message to the opposing party. Good mediators, of course, do not do that.

Given that mediation is nothing more than a negotiation between two parties who hopefully want to settle their dispute with the assistance of a facilitator, there is rarely any benefit to be had by developing an aggressive and adversarial relationship with the mediator. The mediator is there to help the parties achieve their objective, and, while your primary role as counsel is to guide your client through the process, you will likely achieve an overall better result if you are perceived by the mediator as someone trying to help them do their job.

Although most mediators generally develop a relatively thick skin early in their careers, they are nonetheless human and will naturally be inclined to want to help those who are trying to help them, rather than those who put on an unnecessarily oppositional show, seemingly for no other purpose than to impress their clients. In fact, adopting a strong adversarial posture may have the opposite effect. It may leave your client with the false but unfortunate impression that you are trying to avoid a settlement in order to keep the litigation going to serve your own financial interests.

Getting into arguments with the mediator with respect to any evaluative input that may be offered up during caucus sessions is rarely helpful or likely to signal to the neutral that you are trying to achieve a settlement. While you may think that your client wants to hear you rebut every weakness or negative aspect of your case identified by the mediator, it is far more important that your client hear and consider all such impartial observations. Then, when the mediator leaves to meet with the other party, you can help your client to evaluate those concerns as part of the overall process of determining the degree to which they are prepared to compromise.

In short, making the mediator your friend rather than your adversary is more likely to serve your client's best interests.

Avoid misleading the mediator

Frequently, when preparing a client for mediation, counsel will try to establish some guidelines and parameters as to the essential elements of an acceptable settlement, including the extent to which the client is prepared to compromise on monetary or other substantive issues. For example, counsel may determine that the plaintiff client would be satisfied (albeit not happy) if they could obtain a financial settlement of 65 percent of their claim. Similarly, a defendant might be reluctantly prepared to pay 50 percent of the plaintiff's claim, provided they can obtain a full and final release. In either case, this privileged information need not, and generally should not, be disclosed to the mediator until counsel or the client determines that it is advantageous to do so.

That being said, while counsel need not disclose the client's supposed "bottom line," it is unwise to convey to the mediator positional statements that counsel knows are untrue. Nonetheless, every mediator has probably experienced a situation where, early in the process, counsel confidently announces in caucus that there is "no way that my client would ever consider accepting a penny less than 80 percent of their claim." This sort of posturing in circumstances where counsel knows that the client would accept significantly less, aside from being unhelpful to the process, is simply a lie and, I would argue, offends the standards of professional conduct that one rightly expects to be observed by a member of the bar.

Leaving aside the ethical lapse and the fact that these sorts of statements do not advance the prospects of a successful outcome, they will rarely be taken seriously by an experienced mediator, and counsel may lose significant credibility with that mediator when the client eventually accepts far less. Lawyers who routinely make these strong positional statements at the outset but fold like a house of cards in the end, often do their clients and their own reputations a disservice.

Even if the positional statement you make is consistent with your client's instructions prior to or in the early stages of the mediation session, you will often be surprised by how those instructions may evolve over the course of the day. Early expectations are generally aspirational and are often significantly tempered as reality sets in. It is rarely a good idea to draw lines in the sand early in the process. Nonetheless, if your client is insistent on sharing with the mediator a strong position inconsistent with what you have been told in private, it is probably better to let the client set it out, rather than you making a statement that you know to be false or misleading. If or when the client backs down, your credibility will remain intact.

Try not to prevent your client from speaking during caucus sessions

In my opinion, one of the worst practices by counsel occurs when they instruct their clients to, "Let me do the talking. Do not say anything, even if the mediator asks you a direct question." While this sort of instruction may be motivated by

a concern that the client will say something prejudicial to their interests, rarely is this restriction going to be helpful to the process. In all likelihood, this may be the first and, in many cases, the only opportunity that clients will have to unburden themselves to a neutral third party in a safe environment.

It is not that the mediator really needs to hear from your client. Rather, a successful conclusion to the mediation may turn on whether your client feels that they have had an opportunity to be heard by the mediator. Having reviewed the submitted mediation briefs the mediator will be well aware of your position, and an experienced mediator will probably have a pretty good idea of what your client will say on any given issue. Although hearing from the client directly is not usually for the benefit of the mediator, your client may be more willing to give up having their day in court if they are given an opportunity to have their say to a neutral facilitator.

There is obviously a significant emotional and psychological aspect to most mediations. Clients often want an opportunity to tell a neutral their side of the story, not in legalistic terms, but rather from the perspective of how the dispute has affected them or their company. Even if a client is ultimately unhappy with the achieved mediated settlement, they are likely to be less dissatisfied if they feel they have had an opportunity to be heard – in some cases, simply to vent.

When conducting mediations, I often direct questions to the client representative to give them that opportunity, especially when their body language conveys to me that they are chomping at the bit to participate more actively in the process. This approach also creates an opportunity for me to respond directly in an empathetic manner to ensure that they understand they have been heard, even if I am not in a position to agree with their perspective or deliver everything they want. When the mediator does not invite direct client input, you, as counsel, may want to invite your client to answer a question, share their perspective, or respond to a proposed settlement initiative.

Similarly, when given an opportunity to participate directly, the client may occasionally reveal to the mediator something they may value as part of a potential settlement outside of the strict confines of what a court could award. In some cases, this revelation could be nothing more than a desire for an honest apology or perhaps the rehabilitation of a valued personal or business relationship. It is not uncommon that a client representative has twigged me to some potential basis for a settlement of which even counsel was unaware.

There is little risk associated with following this advice. Bear in mind that mediation is an off-the-record and without-prejudice process. If you feel that your client has said something unhelpful or prejudicial to their case in a caucus session, you can always instruct the mediator not to disclose that information to the opposing party. As a result, there is really little to be feared and much to be gained by letting the client have their say.

Conclusion

Remember, when you come to mediation, you are there to achieve a settlement – not to *win* a case. In many instances, achieving an acceptable settlement may be all the *win* your client needs to move on. Bearing in mind that well over 95 percent of all lawsuits are resolved without a trial, the greatest service you can often provide to your client is to help in achieving that result at the earliest possible time, and before additional costs are incurred.

Pardon the interruption:

Supreme Court advocacy and judicial interjection

Alex Bogach, Justine Dryburgh, Molly McMahon, and Jeremy Opolsky

How long do you have to make a first impression?

Appellate advocacy is often – and rightly – considered an art of answering hard questions from the bench. But before that onslaught of questions begins, advocates have a window to introduce their case, describe their argument, and set out their equities. So important are these introductory submissions, the US Supreme Court gives lawyers time, protected from questions, to make them.[1]

But, in Canada, how long do you have to make this introduction before the questions start flying?

In the late fall of 2023, as two of the authors of this article were preparing for oral argument at the Supreme Court of Canada, we asked ourselves that very question.

The length of the opening was particularly important because we had limited time. The Supreme Court had decided to hear two appeals that morning, giving each party only 30 minutes. As a co-respondent, we had half that time: 15 minutes.

Our goal was to open by throwing out a concise, highly focused submission – like a "snowball packed tightly into an iceball."[2] We wanted to get as much of the heart of our case out at the beginning of our submissions. In the weeks before our hearing date, we finally constructed our iceball: a pithy introductory statement that told the Court why we had to win the case.

But how long did we have to make this argument before the judges' questions took us on a different course? What if our introduction spurred a judge to ask a question that unpacked this carefully moulded submission? Worse yet, with only 15 minutes of argument, would we find another window to throw it out there, or would our iceball melt away?

So how long would we have? There was no ready answer. This article sets out to find one. (Spoiler alert: The answer? Not that long at all.)

***

We reviewed every Supreme Court hearing between 2021 and 2024 to provide a belated response to our cry for help.[3]

We hope that this data gives advocates some assistance before they make their pitch at the podium on Wellington Street. But the data we collected and analyzed also goes beyond that. It answers questions like:

- Which judge is most likely to ask me the first question?
- How does the rate of first interjections change in different cases (civil vs. criminal) or in different panel sizes (five, seven, or nine)?[4]
- Are appellants asked a first question faster than respondents are?
- Do intervenors get asked questions at all?
- Is there any correlation between an early interjection and winning (or losing) the case?

These data points are useful for counsel preparing for argument, but they also tell us more about how the Supreme Court operates. They shed light on the factors that impact and shape the course of oral argument.

Data collection process: A preliminary note

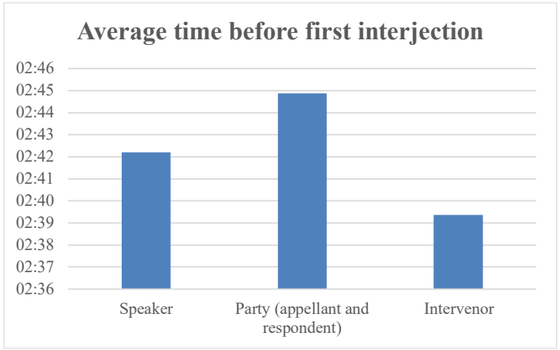
The data discussed below was collected by reviewing the Supreme Court judgments and watching the Supreme Court's archived webcasts. Each webcast was viewed in the language in which counsel gave submissions (i.e., French or English). If submissions were divided among two or more counsel, each speaker was counted separately. Time data was collected by noting the video time when a party began speaking and was asked their first question. Each coder followed the same coding manual; however, we acknowledge the potential for human error. We have also not tested the findings for statistical significance.

We note that, unless specified, any references to our findings include all oral hearings from 2021 to 2024. Because intervenors are often able to give submissions without interjections, to avoid skewing the overall results we excluded intervenors who did not receive any questions. We include further details of the methodology in the endnotes to this article.[5]

How long before a Supreme Court judge asks the first question?

The average amount of time before a speaker was asked their first question was 2 minutes, 42 seconds. On average, parties were asked their first question at 2:45, while intervenors were asked their first question at 2:39.

On the extreme ends, the longest amount of time before a speaker received their first question was 13:13.[6] The shortest amount of time before a speaker received their first question was zero seconds.[7] In this case, as the respondent approached the podium, ready to begin his submissions, Justice Kasirer interjected with a question about the respondent's position on a matter raised by the appellant. While you are likely to have longer than zero seconds to get your submissions off the ground, it might not be much more than that; 34 percent of parties were asked a question within the first minute of their submissions.



- ***Appellants are asked their first question sooner.*** On average, appellants are asked their first question sooner than respondents. The average first interjection time for an appellant was 2:39, whereas the average first interjection time for a respondent was 2:51.
- ***Parties in civil cases are asked their first question sooner.*** Parties in civil cases are asked their first question sooner than parties in criminal cases. The average amount of time before a party was asked their first question in a civil case was 2:30. In contrast, parties in a criminal case were asked their first question at 2:54 on average. We note that some of this difference may be due to the fact that criminal appeals are granted leave as of right. Further inquiry would be helpful to compare criminal and civil appeals where leave was granted by the discretion of the Court.
- ***Intervenors and interjections.*** Intervenors are asked questions, but far less frequently than appellants and respondents. On average, only 61 percent of intervenors are asked a question during their submissions, whereas 99 percent of speakers for the appellants[8] and 98 percent of speakers for the respondents[9] were asked a question. (In the cases where an appellant or respondent speaker was not asked a question, the speaker delivered submissions only for a brief period (five minutes on average), and, in all cases but one,[10] the speaker's submissions followed the submissions of co-counsel.)
- Those intervenors who received a question had an average of 2:39 to speak before the first interjection. The longest time before an intervenor was first asked a question was 9:30, and the shortest time before an intervenor was first asked a question was four seconds.[11]
- ***Who's asking?*** We analyzed the rate at which each judge asked a party speaker (appellant or respondent) their first question. Justice Brown, Justice Côté, and Justice Rowe were on the high end of the spectrum – they asked the first question to 26 percent, 24 percent, and 21 percent of the parties they heard, respectively. On the low end of the spectrum were Justice Karakatsanis, Justice Moreau, and Justice O'Bonsawin, who asked the first question to 4 percent, 4 percent, and 3 percent of the parties that they heard, respectively.[12] With the Court's current composition, advocates should consider it likely that Justice Côté or Justice Rowe will interject with a question first.

Percentage of parties the judge asked a first question to, relative to the total number of parties the judge heard

Judge	Percentage of parties
Brown	26%
Côté	24%
Rowe	21%
Abella	18%
Kasirer	13%
Wagner	13%
Jamal	9%
Moldaver	8%
Martin	7%
Karakatsanis	4%
Moreau	4%
O'Bonsawin	3%

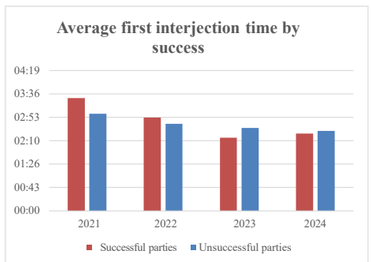
Nothing to write home about

Success: Where preparation meets opportunity … meets 9 extra seconds?

In some cases, contrary to our expectations, our data didn't bear out any notable correlations. For example, we found that there was some correlation between success and first interjection. But the time difference is not significant; it fluctuates on a year-by-year basis, and it is unclear if there is any statistical significance to it.

In general, the successful party will have longer to speak compared to their unsuccessful counterparts. Our data showed that, on average, the successful party will be asked their first question after 2:49. By contrast, their unsuccessful counterpart will be asked their first question after 2:40.

However, the average interjection time between successful and unsuccessful parties ranged considerably across the years. For example, in 2024, the average first interjection time for the successful party was 2:28, but the average first interjection time for the unsuccessful party was just two seconds behind, at 2:26. Compare this to 2021, where the successful party had, on average, 3:30 to speak before the first interjection. In the same year, the average time before an unsuccessful party received the first interjection was a full 31 seconds less, at 2:59. (Perhaps these differences are due to the fact that, in 2021, counsel appeared remotely – which may have cooled question-asking, particularly when the judges were already in agreement with counsel).



No sizeable difference?

Panel size and first interjection

Contrary to our expectations, we did not identify any major correlation between panel size and first interjection. The average time before first interjection in a five-member panel was 3:08; for a seven-member panel it was 2:34; and for a nine-member panel it was 2:43. Although this statement indicates that five-member panels are slower to ask a first question, it doesn't indicate a linear correlation between panel size and first interjection time.

Areas for further inquiry: Gender and remote submissions

As we started finding answers, more questions emerged. Was there any correlation between gender and first interjection? How had COVID impacted the numbers? Our data revealed some interesting correlations; however, more work needs to be done to draw any final conclusions. These are merely observations based on the limited data collected, which itself is subject to the fallibility of our data collection.

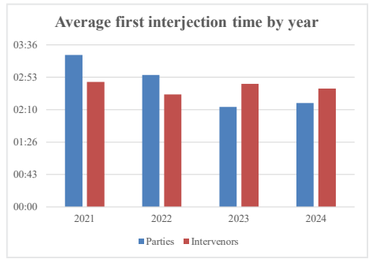
Gender and Supreme Court advocacy

We tracked the varying interjection rates for advocates and judges based on their gender. Our methodology is imperfect because of a lack of reliable gender data. But our preliminary findings show a trend that female counsel are asked questions sooner than their male counterparts. The authors are working on expanding this data set with the hopes of publishing a more detailed article exploring these data points.

COVID-19: The pros and pitfalls of appearing via video

We also observed that judges intervened more slowly when advocates appeared virtually via video during COVID-19 as compared with those who appeared in-person in Ottawa. During 2021 and 2022, both parties and intervenors appeared predominantly via video. During these years, parties had 3:21 and 3:04, on average, before their first interjection. In 2023 and 2024, when parties predominantly returned to in-person hearings, these numbers plummeted to 2:11 and 2:16. Compare this to intervenors, who have remained appearing via video from 2021 to 2024. The average interjection time for an intervenor has been more static (2:47 in 2021, 2:29 in 2022, 2:44 in 2023, and 2:38 in 2024.)

Slower interjection speed for virtual submissions suggests that judges may change their question-asking strategy depending on the medium of those submissions. However, because we started tracking data only in 2021, this is another area of our research that needs more data. The pre-COVID interjection rates for parties and intervenors could shed further light on the impact of remote hearings.



In addition to the quantitative differences identified between virtual and in-person hearings, we also made note of certain qualitative differences when advocates appear virtually.

Of course, there were the countless "you're on mute" comments (always embarrassing, but perhaps particularly so when it is coming from the Chief Justice of Canada's apex court).

We also witnessed other, more substantive technological hurdles. Sometimes a speaker was not able to hear questions put to them by the Court. In these cases, the individual would continue their submissions, unaware (perhaps blissfully) that a question had been posed to them. These failed interjections highlighted the shortcomings of remote appearances: They tangibly affected the Court's ability to engage in a real-time dialogue.

Although these concerns have been alleviated, in part, by inviting parties back to Ottawa for in-person submissions, they remain important. Supreme Court intervenors continue to be required to appear via video.

Conclusion

As it turns out, Justice Côté – the current Court's most frequent first-question-asker – posed the first question to us in our case: one minute and 12 seconds into our response. Two further questions followed shortly thereafter.

And that "iceball" – the short summary of why we thought we won the case? It had to wait until those initial questions were answered and our roadmap complete, four minutes and 40 seconds into the argument.

Do a few minutes and a couple of seconds matter, or is this exercise just a bunch of nerdy statistics and a cool excuse to use a stopwatch? Maybe both.

But if parties know they have an average of 2:45 to make their opening pitch, there isn't a lot of time for windup. And when, as in our case, questions come earlier, it's best to have a backup plan.

Notes

1. Supreme Court of the United States, *Guide for Counsel in Cases to be Argued Before the Supreme Court of the United States*, October Term 2024 (Washington: 2024) at 7.
2. *McKesson Canada Corporation v Canada*, 2014 FCA 290 at para 24.
3. Justine Dryburgh and Molly McMahon undertook the enormous effort of meticulously analyzing each Supreme Court hearing video. Their co-authors, Jeremy Opolsky and Alex Bogach, are deeply indebted to the seriousness and dedication that both Justine and Molly invested into this arguably whimsical and undeniably nerdy project. The authors would also like to thank Michael Kim, a document specialist at Torys LLP, who provided tremendous assistance with analyzing the data, and Terrel Henry-Hutchinson, a summer student at Torys, who got the ball rolling on the data collection during the summer of 2024.
4. For clarity, "first interjection" means the first time that a speaker (appellant, respondent, or intervenor) was asked a question after beginning their submissions. This phrase is used interchangeably with the expression "first asked a question" or "asked their first question" throughout the article.
5. "Party" or "parties" refers to an appellant or respondent but excludes intervenors. "Intervenor" refers only to intervenors who were interrupted; those who were never interrupted are excluded from this data set. All times are rounded to the nearest whole second. All percentages are rounded to the nearest whole number.
6. This was a respondent in the hearing for the decision *Richardson v Richardson* 2021 SCC 36.
7. This was a respondent in the hearing for the decision *R v Landry*, 2024 SCC 2.
8. An appellant speaker did not get asked a question in the following decisions: *R v Samaniego*, 2022 SCC 9; *R v Stairs*, 2022 SCC 11; *R v I.M.*, 2025 SCC 23.
9. A respondent speaker did not get asked a question in the following decisions: *R v Strathdee*, 2021 SCC 40; *F. v N.*, 2022 SCC 51; *Ponce v Société d'investissements Rhéaume ltée*, 2023 SCC 25; *La Presse inc. v Quebec*, 2023 SCC 22; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5; *Auer v Auer*, 2024 SCC 36.
10. This case was *R v Strathdee*, 2021 SCC 40. The appeal had proceeded as of right to the Supreme Court. The respondent was allocated 30 minutes to deliver submissions but took only approximately eight minutes.
11. This was an intervenor in the hearing for the decision *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39.
12. These numbers do not add up to 100 percent because of the different panel compositions of the Supreme Court.

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Superior access to justice predominates for victims of institutional abuse

Matthew W. Taylor

Following amendments to introduce predominance and superiority requirements in the Ontario *Class Proceedings Act* (*Act* or *CPA*),[1] the future of class actions claiming damages for personal injuries appeared uncertain in Ontario. A genre of claim that appeared particularly vulnerable to extinction was the institutional abuse class action. Such claims, often involving allegations of sexual, emotional, and physical abuse, raise myriad apparently individualized issues at the damages valuation stage of the proceeding. Government and government adjacent entities are generally the defendants in institutional abuse class actions; a cynic (or a realist, depending on whether one is a member of the plaintiff or defence bar) may suspect that the amendments to the *CPA* were tailor-made to target institutional abuse claims.

If the amendments to the *Act* were interpreted to deprive victims of institutional abuse the procedural vehicle of a class action, it would effectively close the courthouse doors to society's most vulnerable members, who often cannot afford to sue absent a class action. In this author's view, such an interpretation would amount to a shameful display of further victimization for survivors of institutional abuse who are entitled to damages for the travails they have endured. Only now, this second-order victimization would be at the hands of the legislative and judicial branches of government, rather than the executive that generally oversees institutions such as youth detention centres, psychiatric hospitals, and correctional facilities that form the backdrop to institutional abuse claims.

However, a nascent body of jurisprudence suggests institutional abuse class actions remain alive and well in Ontario. This welcome interpretation of the amendments will, beyond offering victims continued access to the courts, offer fertile fields for the continued development of important areas of jurisprudence such as constitutional remedies, the bounds of fiduciary duties (particularly those owed by the Crown), and the law of limitations which often arise in institutional abuse claims. This developing body of law interpreting the amendments to the *CPA* present important advocacy opportunities for both plaintiff's and defence counsel in terms of how they frame, or respond to, a proposed class proceeding at certification.

On October 1, 2020, the amendments to the *Act* came into force and modified the preferable procedure criterion of the certification test. While there are five requirements for the certification of a class action in all common law provinces,[2] the preferable procedure criterion is generally the most fiercely contested battleground during certification motions for institutional abuse claims.

Under the amended *CPA*, for a class action to be the preferable procedure, plaintiffs must demonstrate that the common issues in their proposed class action predominate and that the class action is the superior means of obtaining relief or addressing the impugned conduct. Similar requirements have long existed in the US *Federal Rules of Civil Procedure* governing certification of class actions in the American federal court system. Other Canadian provinces (most notably British Columbia) have also included the question of whether the common issues "predominate" as a *consideration*, but not *prerequisite*, in determining whether a class proceeding is the preferable procedure.[3]

Owing to difficulties certifying personal injury actions in US courts, plaintiffs feared (and defendants hoped) that the amendments to the *Act* meant these claims would no longer be viable as class actions. The amendments to the *CPA* did not impose these new requirements on cases filed before October 1, 2020; and certification motions are significant undertakings, meaning it took years before the courts had to grapple with what predominance and superiority require under Ontario law.

During this interval, the class action bar was left wondering: How different is the class action landscape in Ontario following these amendments? While the Court of Appeal has yet to interpret these requirements, a developing body of jurisprudence suggests that the Ontario class action landscape is not that different after all, and that many of the core genres of personal injury class actions, including institutional abuse, product liability, and *Charter* claims against the Crown, can meet the predominance and superiority requirements.

Institutional abuse claims are particularly worthy of consideration as they affect the rights of society's most vulnerable members: elderly people in care facilities, children in state custody, involuntary psychiatric patients, and all manner of individuals who find themselves entirely reliant on the state or state adjacent entities. They raise challenging legal issues and touch upon core values of what Canadian society is, and what we think it ought to be. This article describes the amendments to the *Act* and specifically how they impact institutional abuse claims; highlights how some developments in substantive law assist class plaintiffs in other genres of cases in meeting these criteria; and describes how the amendments present important advocacy opportunities for all parties.

The amendments to the *Act* and the American experience

The amendments to the *CPA* added the following criteria for certification:

> 5(1.1) In the case of a motion [for certification], a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
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> (a) *it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct* of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
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> (b) *the questions of fact or law common to the class members predominate* over any questions affecting only individual class members [author's italics].

The perception that personal injury class actions would no longer be viable in Ontario after the amendments to the *CPA* was due at least in part to the existence of equivalent provisions in the US *Federal Rules of Civil Procedure* that make personal injury claims uncertifiable. This was an understandable view to take, given the similarity in language between the predominance and superiority requirements of the *CPA* and those contained in Rule 23 of the US *Federal Rules of Civil Procedure*.[4] In a 1997 decision, *Amchem*, the Supreme Court of the United States ruled that because of the predominance and superiority criteria in Rule 23, generally speaking, "mass tort cases arising from a common cause or disaster … are 'ordinarily not appropriate' for class treatment."[5] That decision considered a settlement class for individuals exposed to asbestos suffering health effects as a result. Following that decision, personal injury class actions have not been certified in the American federal courts, with few exceptions.[6]

The *Banman* test for predominance and superiority in Ontario strikes a different chord than *Amchem*

In 2023, the first contested certification decision applying the predominance and superiority requirements was rendered in an institutional abuse action.[7] *Banman* took a decidedly different, and in my view better, approach to predominance and superiority than American jurisprudence.[8] Some understanding of the factual backdrop of *Banman* is necessary to elucidate how different these approaches are.

The plaintiffs in *Banman* were former involuntary psychiatric patients who alleged that they, and other patients in a secure unit at the St. Thomas Psychiatric Hospital (St. Thomas), were subjected to abusive, experimental treatment between the years 1976 and 1992. The plaintiffs claimed primarily for damages flowing from personal injuries, including sexual assaults. *Banman* was certified despite a similar and factually related case being denied certification under the pre-amendment *CPA*.[9]

The core of the plaintiffs' allegations in *Banman* was that class members, who were largely female patients, were subject to an experimental treatment program involving harsh discipline and an explicitly authoritarian structure that left so-called "patient-teachers" in charge of other patients to mete out punishment and impose discipline. Some of the patient-teachers were male sex offenders transferred from a maximum security psychiatric hospital to implement this program at St. Thomas.[10] Certain of the plaintiffs in *Banman* alleged that they were sexually assaulted by patient-teachers and advanced as part of their claims against Ontario their entitlement to damages for these sexual assaults committed by patients. They alleged that Ontario failed to prevent the assaults and, in fact, had created the opportunity for them to occur by placing patients in positions of authority over one another.

Despite the individualized inquiries required to quantify damages flowing from personal injuries, Justice Perell found that for a significant portion of the class the common issues predominated.

This is a starkly different response by the Ontario court to a fact situation that is, in many respects, analogous to *Amchem*. In *Amchem*, Justice Ginsburg relied on the wide range of claims – from those who had advanced cancers to those who may never be injured at all – and the difference in interests of the claimants in the proposed class in determining that the common issues did not predominate and the proposed settlement class should not be certified. Justice Perell when confronted with a similar diversity of claimants in *Banman* reached the opposite conclusion:[11]

> Save for some indicia of systemic problems at St. Thomas Psychiatric Hospital *there is nothing common about the sexual assault claims which are idiosyncratic. For patients with an assault or a sexual assault claim, assuming they had economically viable claims, a class action would not be preferable because the common issues, if any, do not predominate over the individual issues*. The sexual assault claimants are an example of this phenomenon. Although these patients may have something to gain by staying in the class action, particularly if they have weak cases or modest claims, nevertheless, for them the questions of fact or law common to the class members do not predominate over any questions affecting their individual claims. Indeed, there is very little about sexual assault claims that can be decided in common. …
> *This revelation about the sexual assault and the assault claims, however, does not negate the preferability of a class action in the immediate case for the other patients*. Some of the assault victims, for instance, may also have general claims against the Government of Ontario for other malfeasance or misfeasance and these claimants may benefit by remaining class members. Further, the matter of whether patients with economically viable assault or sexual assault claims might advantageously opt out is a matter that could be addressed in the Notice of Certification (perhaps with an invitation from Class Counsel to be consulted about an individual issues retainer) [author's italics].

In his preferable procedure analysis, Justice Perell developed a test for determining how the criteria in the amended *Act* ought to be applied. He articulated an analysis that requires four comparative inquiries between the proposed class action and the alternatives, all of which are to be conducted through the lens of access to justice, behaviour modification, and judicial economy (the three goals of class proceedings):[12]

> (a) whether the design of the class action is manageable as a class action; (b) whether there are reasonable alternatives; (c) whether the common issues predominate over the individual issues; and (d) whether the proposed class action is superior (better) to the alternatives. This analysis is accomplished by comparing the advantages and disadvantages of the alternatives to the proposed class action through the lens of judicial economy, behaviour management, and access to justice.

According to *Banman*, the purpose of the predominance requirement "is to ensure that the common issues – taken together – advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice."[13]

This approach to predominance and superiority is fundamentally different from American jurisprudence. The Court was presented with American authorities at the certification motion but did not rely upon them. Instead, Justice Perell took a distinctly Canadian approach to these requirements, which reflected differences in Ontario law and procedure. Unlike *Amchem*, far from finding that a diversity of interests for class members meant the common issues could not predominate, in Ontario a class can be certifiable even if there is an identifiable group within the class whose claims, in part, have "nothing [in] common" with the claims of other class members. For such class members, the class action was not, in Justice Perell's view, preferable. However, the likely larger group of class members for whom the class proceeding *was* the preferable procedure meant the action as a whole could be certified.

Also noteworthy about *Banman* was that the quantification of damages was wholly individualized. Although the *Act* permits awards of aggregate damages, in whole or in part for class members' claims, Justice Perell refused to certify an aggregate damages common issue in *Banman* as he found there was no basis in fact for a "base level of harm" for all class members.[14] Recent jurisprudence, such as the solitary confinement litigation, has demonstrated that personal injury and *Charter* claims can at least in part be addressed through an award of aggregate damages if the claimants can establish a "base level of damages."[15] The plaintiffs in *Banman* unsuccessfully sought to do just that, and Justice Perell noted the following about how such issues interact with the predominance criterion: "[T]he prospect of even a partial award [of aggregate damages] at a common issues trial optimizes the preferability of a class action."[16]

Application of the *Banman* test and certification of a national class alleging personal injuries

Are large, national personal injury class actions still sustainable under the amended *Act*? Before the amendment of the *CPA*, the Ontario common law provinces all shared a largely common test for certification, with minor differences in terms of the drafting of their respective statutes and their interpretation.[17] The amendment of the *CPA* threatened to disrupt this uniformity and could have presented significant challenges to the certification of national class actions. Although the certification of *Banman* demonstrated some personal injury class actions were still viable, it was a relatively small case: It concerned 429 patients in one unit of one hospital. Although the action covered a span of 16 years, the scope of the factual inquiry at trial would be limited, given the limited geography and scope of potential witnesses.

Do national class actions remain viable for common law Canada? How do the predominance and superiority requirements apply in proposed national class actions such as the solitary confinement litigation that concerned all federally administered correctional facilities? Justice Glustein recently answered these questions in deciding *Richard*.[18] His reasons confirm that national cases with much larger scopes of factual inquiry, potentially applicable law, and thousands of class members can meet the *Banman* test.

Richard also illustrates another divergence from American law. *Amchem* was a proposed national settlement class, and as a result implicated differences in laws between jurisdictions within the United States; for instance, some states recognized claims for medical monitoring and others did not. Justice Ginsburg noted that the court below identified differences in state law as further complicating the diversity of interests

among claimants.[19] In *Richard*, Justice Glustein was faced with a claim that covered the entirety of Canada (except Nunavut). He summarized the case succinctly at the outset of his reasons:[20]

> Between May 15, 2016 and July 18, 2023, 8,360 persons detained by the Canadian Border Services Agency ("CBSA") under Division 6 of Part I of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") were incarcerated in 87 provincial and territorial prisons across Canada ("provincial prisons"), pursuant to agreements between CBSA and every Canadian province and territory except Nunavut.

The plaintiffs in *Richard* claimed compensation for torts and breaches of their *Charter* rights. They alleged that their detention in prisons violated various of their constitutional rights and caused them harm.

In considering the predominance and superiority requirements, Justice Glustein applied the *Banman* test:

> *Factor 1, manageability*:[21] The design of the class action was manageable as it was "focused on the core question of the CBSA practice of using provincial prisons for immigration detention," which he described as a "'bright line' issue" that was "best managed as a class action."[22] Addressing the concern about differing law between jurisdictions (one of the concerns in *Amchem*), Justice Glustein held that the *Charter* jurisprudence was national in character and that, while there was no evidence of "material differences in the law of negligence across the country," even if there were, it would not have been a barrier as "judges hearing national class proceedings can apply the law of different jurisdictions as necessary."[23]
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> *Factor 2, reasonable alternatives; and factor 4, superiority:*[24] The only alternative identified by the defendant was judicial review. For a number of reasons, including the inability to award damages or address all causes of action advanced by the plaintiffs, Justice Glustein found this alternative wanting. Similarly, he considered individual actions, joinder or consolidation, and test cases as inferior alternatives as they may not have been economically viable. As such, the class action was the superior means of addressing the issues in the proceeding.
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> *Factor 3, predominance:*[25] The court found the common issues predominated as they would address the core questions of liability and what kinds of damages were available. Justice Glustein also held that the predominance of the common issues was further bolstered by the potential availability of aggregate damages. If such an award were made, only individual entitlement beyond a base award would remain for individual issues trials.

The analyses of Justices Perell and Glustein suggest many other personal injury class actions remain viable, particularly in light of recent legal developments

The decisions in *Banman* and *Richard* bode well for institutional abuse class actions, as well as any other class proceeding involving personal injuries based on systemic conduct, as do certain substantive developments in the law. For instance, the potential for aggregate awards redressing base levels of bodily harm, or for *Charter* breaches, was discussed in both *Banman* and *Richard*. This suggests institutional abuse and governmental liability actions alleging *Charter* breaches related to personal injury remain good candidates for certification. Both *Banman* and *Richard* were such cases (one succeeded in certifying an aggregate damages common issue and one did not). Recent changes in the law related to causation and informed consent suggest two other kinds of personal injury class actions would likely meet the predominance and superiority criteria: product liability and cases involving issues of consent.

The core question in almost every product liability action is general causation. For product liability claims alleging personal injury flowing from a product defect, the most daunting individual issue is usually specific causation. The Court of Appeal for Ontario recently confirmed in *Levac* that both inquiries are amenable to statistical determination in the context of a class proceeding.[26] In that case, the court affirmed the reasons of Justice Morgan who, following a common issues trial that determined a physician had been negligent in his infection prevention and control practices, determined that when the impugned product (or practice) at least doubles the odds of a specific injury occurring, that "causation has been established for the class 'presumptively' – i.e. subject to proof to the contrary."[27] Following this he cited the reasons of Justice Lax in *Andersen* which explained the principle as:[28]

> That is, whether or not the risk ratio is above 2.0 determines upon whom the evidentiary responsibility falls in determining individual causation …
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> I also note that the level of a risk ratio relative to 2.0 determines the *extent* of the evidentiary responsibility for the party on whom it lies. … Thus, the risk ratio for any given complication determines both the *direction* and the *extent* of the evidentiary responsibility when individual claims are brought forward [italics in original].

This is a practical approach that accords with both scientific study of causation and the balance of probabilities test. It also means that any time a plaintiff can plausibly provide "some basis in fact" that such a determination could be made following the common issues trial in a product liability case, the common issues will predominate and the class action will be the superior means of determining class members' entitlement to relief.

Also relevant to medical and institutional abuse claims, and many other types of class actions, is a recent determination that consent (or the lack thereof) can be determined on a group-wide basis. In *Barker*, a multi-plaintiff action factually related to *Banman*, the trial judge found that consent to an experimental treatment program was not possible in a highly coercive environment: "I have already found that even where there was a semblance of consent, truly voluntary and informed consent was not possible in the coercive environment of Oak Ridge."[29] The Court of Appeal affirmed this determination:[30]

> On the issue of liability for breach of fiduciary duty, *there is clearly no error in the trial judge's reliance on a lack of informed consent*. As between a fiduciary and beneficiary, the only type of consent that can be effective is informed consent. …
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> *The trial judge found that truly voluntary and informed consent was not obtained*. In law, this means that the conduct that constituted the breach of fiduciary duty is not excused [author's italics].

This approach to consent could apply to a wide range of cases related to medical treatment or experimentation, cases prosecuted against institutional fiduciaries such as mutual fund managers or trust companies alleging faulty disclosure, or even high-pressure sales tactics in consumer cases. *Barker* was not a class action – ironically it was not certified in part because the judge hearing the certification motion did not accept that consent could be determined in common[31] – but the court's reasons have clear application to a number of class actions and would support a credible argument that cases centred around informed consent may have common issues that predominate.

Conclusion

The predominance and superiority requirements far from foreclosing institutional abuse class actions, and personal injury class actions generally, may have merely changed how litigants choose to frame these cases. Advocates for plaintiffs will surely paint their claims as turning on "bright line" issues as in *Richard*, seek to rely upon statistical evidence, and take as yet unseen approaches to the litigation to take advantage of these and other legal developments. Those advocating on behalf of defendants will in response seek to highlight diversity among claimants, rebut statistical evidence, and advise their clients to provide novel alternatives to class actions in hopes of demonstrating common issues do not predominate and a class action is not the superior means of addressing the

impugned conduct. Although all this may change once the Court of Appeal weighs in on the issue, for now the death of personal injury class actions in Ontario has been greatly exaggerated.

Although *Banman* was not appealed, and it remains to be seen if Canada's appeal in *Richard* will succeed, in this author's view the approach taken in these cases is a practical one that will ensure injured Ontarians continue to have meaningful access to the courts and the laudable goals of the *CPA* will be achieved. These decisions also suggest that the approach to certification of national class actions in Canada has not (yet) been disturbed by the amendments to the *CPA* and such claims may continue to be prosecuted in Ontario. Courts have yet to determine if arguments based on arguable differences in the certification test may interfere with certification of national class actions, but the jurisprudence to date suggests these arguments will be difficult to make.

All this is a welcome development in the law. These decisions suggest that the salutary light shone by class actions for institutional abuse claims will not become dimmed by the amendments to the *Act*. Standing up to the state is a formidable task, even for a well-resourced litigant, let alone a marginalized victim of institutional abuse. The law of predominance and superiority developed to date suggests that litigating these, and other personal injury claims, against state actors remains a genuine possibility in Ontario. Beyond the importance of protecting the rights of specific claimants in any given institutional abuse action, this is a welcome development for the perception of the administration of justice. Closing the courtroom doors on vulnerable individuals rightly diminishes the public's view of the administration of justice. It is fortunate that, to date, the Ontario courts have opted to take another path – a path where superior access to justice for victims predominates.

Notes

1. *Class Proceedings Act*, 1992, SO 1992, c 6.
2. To be certified, a claim must: (1) properly plead a cause of action; (2) seek to represent an identifiable class of two or more persons; (3) raise one or more common issues of fact or law; (4) be the preferable procedure for the fair and efficient resolution of the common issues; and (5) include a representative plaintiff who would fairly and adequately represent the class.
3. *Class Proceedings Act*, RSBC 1996, c 50 s 4(2)(a).
4. Fed R Civ P 23(b)(3): Under this rule, certification requires determinations "*that the questions of law or fact common to class members predominate* over any questions affecting only individual members, *and that a class action is superior to other available methods* for fairly and efficiently adjudicating the controversy (author's italics)."
5. *Amchem Products, Inc. v Windsor*, 521 US 591 (S Ct 1997) at 624–25 [*Amchem*].
6. Such claims are frequently litigated through the Multidistrict Litigation procedure, often culminating in bellwether trials preceding large-scale inventory or MDL-wide settlements.
7. The amendments came into force on October 1, 2020, and actions that were filed before that date remain subject to the pre-amendment *Act*, including the absence of the predominance and superiority requirements.
8. *Banman v Ontario*, 2023 ONSC 6187 [Banman] at paras 342 and 343. The author was part of the plaintiffs' counsel team in Banman.
9. *Egglestone v Barker*, [2003] OJ No. 3137, 2003 CanLII 25791 (SCJ) [Barker], aff'd [2004] OJ No 5443 (Div Ct), leave to appeal to the Court of Appeal denied on May 18, 2005. The author was part of the Barker trial team but was not involved in the case at the certification stage.
10. *Banman, supra* note 8 at paras 83–84, 93–106.
11. *Ibid* at paras 342–43.
12. *Ibid* at para 320.
13. *Ibid* at para 321.
14. *Ibid* at paras 299–300.
15. *Francis v Ontario*, 2021 ONCA 197 at para 110.
16. *Banman, supra* note 8 at para 335.
17. A notable exception is now PEI, which, until recently, had no class proceedings legislation. On June 1, 2022, the *Class Proceedings Act*, RSPEI 1988, c C-9.01, which was modelled on the Ontario *Act* and includes the predominance and superiority requirements (see s 6(2)), came into force.
18. *Richard v Canada (A.G.)*, 2024 ONSC 3800 [*Richard*].
19. *Amchem, supra* note 5 at 624.
20. *Richard, supra* note 18 at para 1.
21. *Ibid* at paras 376–87.
22. *Ibid* at para 378.
23. *Ibid* at paras 383–84.
24. *Ibid* at paras 388–92.
25. *Ibid* at paras 393–407.
26. *Levac v James*, 2023 ONCA 73 [*Levac CA*].
27. *Levac v James*, 2021 ONSC 5971 at para 134.
28. *Andersen v St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras 556–67.
29. *Barker v Barker*, 2020 ONSC 3746 at para 1192.
30. *Barker v Barker*, 2022 ONCA 567 at paras 130–31.
31. In *Egglestone v Barker*, [2003] OJ No. 3137, 2003 CanLII 25791 (SCJ) at para 33, Justice Cullity held that "the question whether a genuine consent was precluded by the manner in which the programs were organized and administered, and by the conditions at Oak Ridge" could not "fairly be determined on a class-wide basis."

Developing good insurance habits in your law practice, and your life

Gord McGuire

Over the past decade, my practice has been increasingly focused on policyholder-side insurance coverage litigation or, less grandiosely, suing insurance companies when they don't pay. In litigating these cases I am frequently struck by two facts: first, just how many ways an insured person or business can lose their insurance coverage innocently and inadvertently, from untimely reporting of claims to mistakes in insurance applications; and, second, just how little known many of these policy provisions are, even to quite a few lawyers.

Here are six ways that lawyers can develop good insurance habits in both our legal practices and our personal lives.

Ask about insurance policies during client intake

After you've cleared conflicts and confirmed the identity of your client, confirming whether the client has any potentially responsive insurance policies should be next on your list. If the client is a defendant or respondent – or a defendant by counterclaim – this inquiry should be a standard step in the file-opening process. Usually, the client can simply be asked to report the claim in question to their insurance broker and have the broker confirm whether any of their policies respond – or potentially respond.

Taking this step involves virtually no time and can lead to coverage the client didn't even know they had, often to their considerable benefit. Corporate insurance policies such as those covering commercial general liability or directors' and officers' liability offer protection from a surprisingly broad array of claims. Even a basic homeowner's policy can respond in counterintuitive ways. For example, as the Court of Appeal for Ontario confirmed last year (*Kerk-Courtney v Security National Insurance Company [TD General Insurance Company]*, 2024 ONCA 676) a home insurer likely has a duty to defend a homeowner who sells their home and later faces a lawsuit for allegedly misrepresenting the condition of the home to the purchaser.

Ask, and ye shall receive; report, and ye shall (with any luck) be covered.

When it comes to reporting claims, be the hare, not the tortoise

Many liability insurance policies today are written on a "claims made" basis, and many such policies provide coverage only if a claim is *first made* and *reported* during *the same* policy period.

While this sounds innocuous enough, it can have extraordinarily draconian consequences. Imagine the client's policy period is June 30, 2023, to June 30, 2024, and they were served with a statement of claim on June 15, 2024. In this case, the claim was "first made" during the 2023–24 policy period and is covered only if it is reported to the insurer *in that same policy period* – i.e., on or before June 30, 2024. The client thus has 15 days to report the claim to their insurer. If they wait 16 days, the policy says there is no coverage.

Many policyholders have sought relief in the courts in such circumstances, but the courts to date have held that relief from forfeiture is unavailable under such policies as a matter of law. Thus, even if the insured missed the reporting deadline by a matter of days, had a compelling explanation for doing so, and the insurer suffered no prejudice by the (barely) late notice, the courts have generally held that the insurer is within their rights to deny coverage.

The other variant of liability policy, being the so called "occurrence" coverage, is slightly more forgiving in terms of timely reporting, but only to a point. Such policies typically require "prompt" reporting and, if a delay in reporting is long enough, the insurer may similarly be permitted to deny coverage. That is exactly what happened in the Court of Appeal decision cited above involving the home insurance policy, which was written on the more forgiving "occurrence" basis. Although the home insurer would have had a duty to defend the lawsuit, they were ultimately not required to do so because the homeowner took two and a half years to report the claim.

The lesson: Any claims received by a client should be reported as soon as possible to the client's insurer and/or insurance broker.

Also report circumstances that *might* lead to a future claim

Many liability policies allow (or require) the insured to report circumstances that might lead to a claim in the future. If the insured reports the circumstance during the policy period in which it occurred, and the circumstance later gives rise to an actual claim – even years later – the claim will be deemed to have been first made during the policy period in which the circumstance was reported, and thus covered under that policy even if it is now expired (assuming the claim otherwise falls within coverage).

Not all policies have such "notice of circumstances" clauses. If your client's policy does, it's crucially important they take advantage of it, especially if the client later changes insurers. The new insurer's liability policy is likely to have a clause that excludes any action arising out of circumstances occurring before the new insurer first went "on risk." That would mean that, even if a statement of claim were issued against your client and immediately reported to the new insurer, the new insurer could decline to cover it on the basis the action arose out of a circumstance occurring before they were the insurer.

The same goes for you as a lawyer. Let's say in 2021 you learn of a circumstance that might get you sued down the road by your client, but you don't report it to your professional liability insurer (meaning LAWPRO, if you practise in Ontario). Imagine your client then sues you in 2025 and you promptly report the action to your liability insurer, expecting coverage. Your insurer is likely to point to provisions of your policy that required you to report circumstances that *might* give rise to a claim in the future. They are also likely to point you to language that deems the "claim" to have been made when you (the insured) first became obligated to give the insurer notice of a potential claim (i.e., 2021). Your insurer will thus argue that, while the lawsuit occurred in 2025 and was reported in 2025, the "claim" is deemed to have occurred in 2021 and, because it was not reported in 2021, is not covered.

The lesson: Circumstances that might give rise to a later claim should be reported to liability insurers without delay.

If you renovate your home – or make other "material changes" – tell your home insurer

Most people expect their home insurance policy will pay for the rebuild of their home in the event of a fire or other major loss, but certain policy provisions put that coverage in peril.

Modern home insurance policies typically contain something called "Guaranteed Replacement Cost," or GRC coverage. GRC means that, even if the policy's limit for building ends up being insufficient to pay the actual cost of rebuilding the home, the insurer will pay what the rebuild actually costs, regardless of the limit. This is why few insurance brokers spend much time explaining the limits to their homeowner clients – the limits are not particularly meaningful in light of the GRC coverage.

The GRC coverage can be used, however, only if the policyholder meets certain requirements. A commonly recurring requirement is the following:

> You notified us, within 90 days of the start of the work, if any improvement, extension or addition has been made to your dwelling that will increase the replacement value by more than $10,000.

Any policyholder who does $10,000 worth of renovations without telling their insurer will thus not be able to invoke the GRC clause, and can access only the building limit that their broker happens to have chosen for them. Those limits are often woefully inadequate, especially with the run-up in building costs brought on by the pandemic. This means that if your policy's building limit is $500,000 and your home costs $1,000,000 to rebuild, you will be left $500,000 short – and all because you did a $10,000 renovation and didn't tell your insurer.

Your policy also contains the requirement to report 'material changes" or else forfeit your coverage altogether in the event of a loss (even one not caused by the change). Taking on tenants, starting to operate a business from home, or installing a wood-burning stove could all potentially be considered material changes. According to some insurers, the presence of even a *single* marijuana plant is a material change in risk that must be reported. If, after a fire or flood, the insurer learned of these changes, it might choose to retroactively rescind your policy and not pay your loss.

When in doubt, report changes to your broker and let them decide if they are material.

Report vacancies as if your home insurance depended on it (it does)

Rental property insurance policies typically contain a provision with words to the effect of, "We do not insure any loss or damage if your dwelling is vacant for more than 30 consecutive days." Policies typically define "vacant" as "when all residents have moved out with no intention of moving back in and another resident has not yet moved in."

In short, if your tenants moved out on May 1, and it is now June 2, you are effectively uninsured. Insurers sell "'vacancy permits" to cover these circumstances, so it's vital such a permit be purchased immediately if a property becomes vacant.

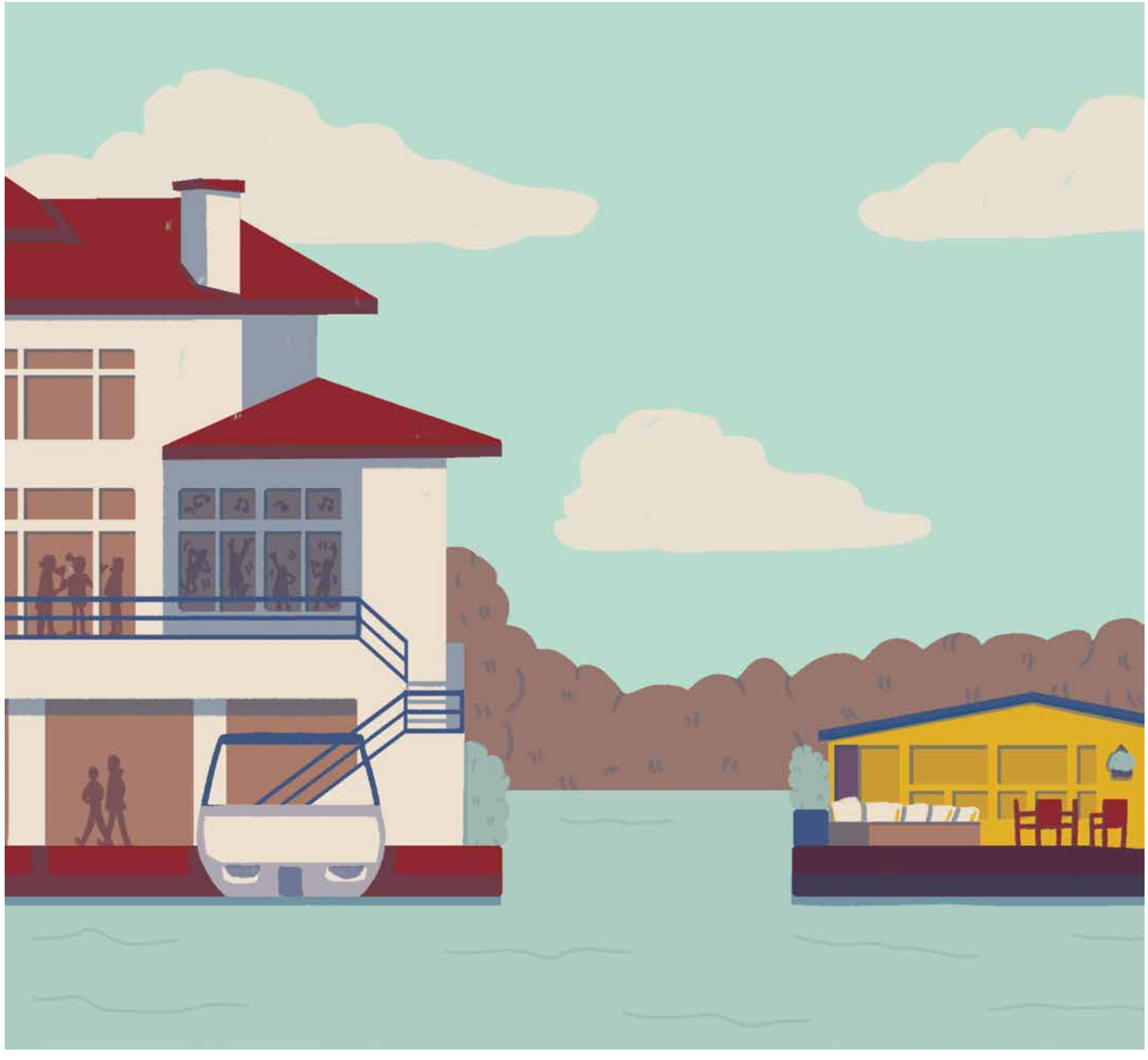
Your home insurance will likely have a similar provision, so if you move out for any reason and 30 days pass without anyone else moving in, you could find yourself uninsured in the event of a loss.

If you own a cottage, it is probably underinsured

As noted above, home insurance policies typically contain Guaranteed Replacement Cost coverage, or GRC, to make sure the homeowner has enough funds to rebuild the home even if the policy's building limit proves inadequate. Insurers will often not offer GRC coverage for cottage properties, however, meaning the policy's building limit is the most the insured will receive in the event of a loss. This condition can lead to massive underinsurance, as limits set many years ago are very likely nowhere near enough to rebuild the cottage today. The law requires insurance brokers to be vigilant about limits and recommend that the policyholder seek professional appraisals to determine the correct limits on their own, but many brokers are not as vigilant as they ought to be.

The lesson: Find out if your cottage has GRC coverage and, if it doesn't, make sure the limit is actually enough to rebuild it. As many of my clients can attest, it's not particularly helpful having building insurance in the first place if it doesn't allow you to rebuild.

When it comes to insurance coverage, an ounce of prevention really is worth a pound of cure, if not a kilogram.



How to prepare and conduct a skilful out-of-court cross-examination

Robert S. Harrison and Richard B. Swan

With the "vanishing trial" a reality in modern civil and commercial litigation, counsel often find that the most fertile opportunity to burnish their cross-examination skills arises in out-of-court cross-examinations on affidavits or in out-of-court examinations of witnesses compelled to give evidence on motions or applications.[1]

A cross-examination conducted out of court presents certain unique challenges. A judge is not present to observe (or control) the examination – there is no live show, nor even a video recording in most cases. All the ultimate trier of fact can do is read the less vivid book version, being the examination transcript. That said, a skilfully conducted out-of-court cross-examination can effectively undermine a witness's credibility, neutralize a damaging affidavit, extract useful admissions, and potentially form the centrepiece of a compelling factual presentation in counsel's factum and oral argument.

The objective of this article is to equip cross-examiners with practical techniques to successfully tackle challenging out-of-court cross-examinations. We will first explore a number of key concepts and techniques and then put some of them to use in two sample out-of-court cross-examination excerpts from a hypothetical civil dispute.

Planning the out-of-court cross-examination

Brilliant cross-examinations seldom emerge extemporaneously. A successful cross-examination, whether in court or out of court, requires careful strategic planning and preparation. An out-of-court cross-examination on an affidavit starts with one advantage in that counsel has the witness's sworn evidence well in advance to carefully examine and break down; at trial, the witness has testified in chief immediately before the start of your cross-examination. With

the affidavit in hand, counsel can carefully assess: (1) what evidence in the affidavit is neutral or superfluous and can be left alone; (2) what evidence in the affidavit is harmful to your position and needs to be addressed on cross-examination; (3) whether the harmful evidence can be neutralized by limiting its scope; (4) whether the harmful evidence must be addressed by contradicting the witness using a control device, such as a document or prior statement by the witness; (5) whether the harmful evidence must be addressed by demonstrating that it lacks logical probability (often through an incremental series of questions building to an unavoidable concession or incredible denial by the witness);[2] (6) whether the harmful evidence can be addressed more generally by undermining the witness's credibility on other points; and (7) importantly, what relevant admissions you can obtain from the witness that might not be addressed in their affidavit at all.

Gathering the raw material to prepare an effective out-of-court cross-examination

In preparing for an out-of-court cross-examination on an affidavit, you cannot limit yourself to reviewing the witness's affidavit alone. You must dig deeper into the documents and pleadings in the case that may assist you in controlling and contradicting the witness, and in extracting admissions. You may also find useful fodder for cross-examination in publicly available information on the internet and social media sites. For example, it may be obvious that the witness has overstated a qualification on their LinkedIn page or has posted something on a social media site that undermines their credibility or materially contradicts their affidavit. As you are gathering your raw material, you should have a topic index for the cross-examination, and you will want to use that index to organize your question points in a logical manner that groups similar points.[3] You will also have to give thought to what issues to tackle in what order, perhaps deciding to first obtain a series of admissions through "friendly" questioning, before moving on to more confrontational points. Conversely, it can be appropriate in some cases to confront the witness with a destabilizing (surprise) question early in the cross, provided that you are confident that it will succeed.

Either way, your cross-examination brief should be organized in a manner that allows you to readily reorganize your question points as you read through your brief and refine it, or even during the cross-examination itself, if necessary.

You may also find useful fodder for cross-examination in publicly available information on the internet and social media sites.

If your cross-examination brief is entirely electronic, set it up in a way that can be easily restructured as you prepare and proceed. If you prefer a paper copy of your cross-examination brief (which does remove the anxiety of having an unexpected power or password issue at the cross-examination), use a three-ring binder that can readily be re-sorted and reorganized, and include immediately behind each question point a copy or excerpt of the document that forms the basis for, or serves as the backup to, your question (where applicable). For re-sorting purposes, the fewer individual question points you have on each page, the better.

Should you script your cross-examination questions verbatim?

To the greatest extent possible, you should avoid writing out all of your questions verbatim. Although less experienced counsel may take comfort in knowing that their questions for the cross-examination are completely scripted, in practice trying to first read and then put verbatim questions to a witness will impede your cross-examination. You will inevitably find that you are distracted by the sequence and language of your script, rather than intently listening to the witness's answers and deciding how to deal with them (more on this below). You may have noted that we used the phrase "question points" above, because it is almost always more effective to set out the point of each question (often in point form) rather than a verbatim question. Moreover, the witness will undoubtedly notice if you are closely following and *reading* from a script of questions, and the witness may then begin to offer unresponsive answers because you are not paying close attention to what they say.

An out-of-court cross-examination is not an examination for discovery

The physical surroundings for an out-of-court cross-examination[4] conducted in person may be seductively the same as an examination for discovery, but the two exercises are decidedly different. Counsel conducting a cross-examination cannot ask open-ended questions out of idle curiosity. Unlike a discovery, whatever the witness says on the cross-examination transcript will be part of the record that will be read by the judge and can be relied on by the other side.

When you arrive at the court reporter's office, you should project an air of understated confidence, even if you might have a touch of anxiety, which is normal. Always be civil with opposing counsel, the court reporter, and others in the examination room. Arrive in good time so that you are not scrambling to set up your laptop, document books, or cross-examination brief. Once you get started, although you may want to briefly note *key* phrases or answers, do not try to write down verbatim the witness's answers; you need to be carefully listening to the import of those answers rather than trying to prepare extensive notes, which is why you are paying the reporter to prepare a transcript. As the cross-examination progresses, you will want to send a clear message that you are in control of the witness and the cross-examination, and not vice versa. You can do this by (1) demonstrating that you are thoroughly prepared and know the facts and the record cold; and (2) confidently posing concise, purposeful leading questions that keep you in control of the flow of the examination, and then asking appropriate follow-up questions when necessary that arise out of the witness's answers (again, more on this below).

Special considerations for cross-examination by videoconference

It has become an increasingly common practice to conduct out-of-court cross-examinations by videoconference, rather than in person. As a general rule, we do not recommend this approach for cross-examining counsel, unless the witness's location or other cost considerations dictate otherwise. It is almost always preferable to cross-examine and "confront" the witness in person, so that you do not appear as a disembodied presence on an 18-inch screen. An in-person examination also makes the handling and marking of documents more straightforward and allows for more direct communication with opposing counsel (including the prospect of potentially discussing a resolution after your successful cross-examination).

If you do have to conduct the cross-examination by videoconference, ensure that you are professionally dressed, that the room in which you are situated is well lit and looks professional, and that your microphone and speaker quality are excellent and synched with your visual image (the opposite can happen when the sound is routed through a desktop phone device). You will also have to be especially mindful of not speaking over top of the witness's answers, and vice versa. At the outset of the cross-examination by videoconference, you should ask a series of questions to confirm that no one (other than perhaps the witness's counsel) is in the witness's room, and that the witness does not have access during the examination to live texts or emails.

Cross-examine the witness, not the affidavit

This is a critical piece of advice. Less experienced counsel often begin a cross-examination on an issue by *first taking the witness to a specific paragraph* in the affidavit, either as a jumping-off point to a question or in anticipation of confronting the witness with a contradiction or limiting proposition to the evidence in the paragraph. Unless it is tactically vital to first cement the witness into what they have said in the paragraph (and it rarely is when the point is stated in writing in the affidavit), *this approach is precisely the opposite of what you should do*.

Starting sections of the cross-examination by taking the witness to the relevant paragraph of their affidavit gives the witness a script or roadmap, which they otherwise would not have, to parry counsel's questions or avoid being trapped in a contradiction. The witness will have a refresher on precisely what they should say in response – indeed, some witnesses may say words to the effect of, "I couldn't have said it better than I do in paragraph 12; that answers your question." Instead, examining counsel should try to extract incremental concessions from the witness that lead to a solid contradiction, or simply extract an available admission, without referring to the affidavit at all. Moreover, the witness's counsel may have conducted a "practice" cross-examination with their client-witness by referring to parts of their affidavit – and when there is no reference to the affidavit itself on your cross, the witness may feel disequilibrated and wonder where the cross-examiner is going.

If you obtain a contradiction from a witness in relation to a point in the witness's affidavit, it is important to know that you do *not* have to directly confront the witness with the contradiction during the cross-examination (although in *some* cases it may be tactically wise to do so). The oft-misunderstood "Rule in *Browne v Dunn*" does not apply for the fundamental reason that the witness's affidavit is part of the proceeding and the witness has already spoken to the issue.[5] The potential risk in pursuing a confrontation – again, assuming it is clear – is that the witness will have an opportunity to explain away the contradiction by saying something to the effect that they did not draft the affidavit and the language in the offending paragraph is inadvertently incorrect. No such explanation will be available if the contradiction is saved for argument.

Maintaining control through concise, purposeful leading questions

Firm control of the witness on the cross-examination is essential. An effective cross-examination must be built around concise, purposeful leading questions. Leading questions can be in the form of a directed interrogatory – "You were in attendance at the July 7 meeting?" – or can employ controlling introductory or concluding language such as, "You would agree that Smith was agitated at the event?" or, "You were late arriving to the play, correct?" Leading questions confine the witness's choice of answers to an option-set that is typically binary, or at least offers a limited number of potential responses which the cross-examiner has anticipated and can control. Although not always possible, as a general rule many of the most effective cross-examination questions seek to elicit a "yes" answer – to the point that the witness gets very comfortable responding affirmatively to a series of questions and unwittingly climbs aboard what we sometimes call the "'yes' train."

Make sure that each cross-examination question posed to the witness: (1) is concise and contains a single point or proposition; (2) is plainly stated and readily understandable; (3) avoids leaving vague or imprecise references in the transcript, such as, "that is what caught your attention?" where "the June 2 letter is what caught your attention?" is much clearer; (4) is framed in the active rather than passive voice; (5) where possible, avoids propositions put in the negative, since a "no" in response might unintentionally be taken to mean disagreement rather than agreement; and (6) avoids the use of subjective or superlative adjectives – "this was one of the biggest mistakes you ever made?" leaves considerable room for deflection and debate.

Always be ready to question off the witness's last answer

As we have noted elsewhere,[6] this "golden rule" applies to all types of examinations, whether an oral discovery, out-of-court cross-examination, or cross-examination at trial. The rule is that *you must always be ready to question off the witness's last answer*. If you come to the cross-examination with a fully formed script of questions to which you slavishly adhere, irrespective of the answers you are receiving, you will be missing important and often necessary opportunities to probe, expand upon, or limit the witness's last answer. While listening intently to the witness's answer to each question, you must *in the moment* determine whether a follow-up question should be asked arising out of that answer, rather than simply moving on to your next question. Focusing entirely on the witness's answer means that while the witness is answering *your* question, you cannot be distracted by silently reading your next question, reviewing the language of a document, or glancing at the latest text on your phone.

If the witness's answer is unresponsive or imprecise, you must firmly press the witness for a clearer or more precise

answer. If the witness's answer offers an unexpected admission, you will have to decide whether to silently accept the admission and move on or determine whether there may be more on offer by probing further (without risking losing the admission by attempting to "gild the lily"). If the witness's answer is unexpectedly harmful or problematic, you cannot simply leave it hanging like a bad odour and move on to your question; you must decide whether you can limit or neutralize the answer with a follow-up question, such as: "To be clear, the observation that John was supposedly slurring his words is what you heard from someone else, not what you yourself observed or heard, correct?" – assuming that you are confident in the proposition. If you are struggling in the moment to follow up on an unexpectedly harmful answer, confidently advise the witness that you will be coming back to the point (and do so after you have had a bit of time to consider how to address it).

Impeaching the witness's credibility

The advantage in assessing a witness's honesty and reliability enjoyed by a trial judge who can observe and listen to the witness in person is beyond argument and has been noted by appellate courts innumerable times. Not surprisingly, when approaching the cross-examination of a witness out of court, experienced counsel will *not* focus on matters that presume observations made of the witness by an attentive trier of fact. Instead, counsel will look to develop credibility impeachment points that are apparent from the words of the witness on the printed transcript.

In this connection, it is settled appellate law that the real test of whether a witness's testimony should be accepted is the consistency of that testimony with the probabilities of the case.[7] Manifestly, the judge does not need to be in attendance to consider the inherent improbability of what a witness has to say on a point, measured against accepted contemporaneous documents or other accepted or irrefutable evidence.

In the same vein, the holy grail[8] for all cross-examiners is to expose contradictions *within* a witness's testimony – even a single inexplicable contradiction can be sufficient if it is significant. A contradiction may be more dramatic when developed in open court, but it will be no less impactful on the outcome if it is clear from the transcript of the out-of-court cross-examination.

The cross-examination opportunity inherent in an affidavit

When it comes to credibility-undermining contradictions, fertile ground can often be found in the witness's own affidavit. Rarely does an affiant draft their own affidavit. The affiant might generally agree with its substance, but importantly they very likely neither determined the detailed content nor chose the words used (including legalisms like "fiduciary duty" or "*inter alia,*" which are giveaways). Under the pressure of cross-examination, many witnesses will not remember the precise details of the affidavit that has been written for them and may unwittingly contradict what is stated. Moreover, a statement in an affidavit may open the door to a vulnerable topic that the witness knows is problematic but drafting counsel may not.

Improper interference by opposing counsel

Given that no judge is in the room during out-of-court cross-examinations, some counsel acting for the witness have no compunction about improperly interfering with a cross-examination. The interference can take many forms: groundless objections, gratuitous commentary on or explanation of the witness's last answer, coaching the witness (for example by directing their attention to a paragraph in their affidavit), or flatly answering for the witness. Interference of this nature is not to be tolerated. In *Shukla v Fenton* (2021),[9] Justice Cullin of the Ontario Superior Court outlined the narrow limits of permissible interjection by the witness's counsel on a cross-examination. The *Shukla* case is a handy reference.

When opposing counsel first interferes inappropriately, you may want to give counsel some early latitude. "Why am I being interrupted?" is a civil way to make the point. You should have limited patience, however. You have a duty to your client to conduct an effective cross-examination and not to let opposing counsel shelter the witness and prevent you from exercising and maintaining control. As soon as you realize you have an obstructionist counsel on your hands, you need to tell that counsel that their interference is unacceptable and not to be repeated. Something as plain-spoken as the following can be effective:

> *Examining Counsel*: Counsel, please do not interrupt me. This is a cross-examination. I am cross-examining the witness, not you. I am entitled to the witness's evidence without your interruptions. If you have a proper objection to a question, you can say so and we will deal with it. Otherwise, I am asking you to respect the well-understood professional rules and let me cross-examine this witness without your comments and interference.

Even intensely adversarial lawyers tend to fall in line when reminded of their professional and ethical obligations by an examining counsel who is in command. If the interference nonetheless persists, you should tell opposing counsel that if the interference continues, on the return of the motion you will be seeking to have the witness's affidavit struck out. This admonition usually does the trick for the stragglers – with the exception, perhaps, of the most obstreperous of counsel for whom a court-imposed remedy may be the only option, regrettably.

Improper objections or refusals

Improper objections by counsel – often without substantive explanation – to an important line of questioning can derail a cross-examination, or at the very least delay it pending a motion to compel re-attendance. The delay itself may amount to a significant setback for your client.

We recommend that you state for the record every intended question, or at least the line of questioning, with specificity. If a credibility issue is at stake, the witness may need to be excluded from the examination room while your explanation is provided. A caution along the following lines can sometimes bring counsel around:

> *Examining Counsel:* Counsel, my questions are plainly proper, and your repeated objections and refusals are inappropriate. On the return of this motion, I am going to ask the motion judge to either strike your witness's affidavit in its entirety, or make specific adverse findings or inferences based on your witness's refusal to answer, or both.

Re-examination

Given the entitlement of the witness's counsel to re-examine after the cross-examination, an unexplored cross-examination answer seemingly helpful to the witness that is left dangling by cross-examining counsel will likely be pursued by counsel for the witness on re-examination. At that point cross-examining counsel will have no right to deal with the witness's elaboration or explanation. Therefore, and as discussed above, it is important for the cross-examiner not to leave such an answer "hanging" and unchallenged, even if it means coming back to it before the conclusion of the cross-examination.

If a credibility issue is at stake, the witness may need to be excluded from the examination room while your explanation is provided.

The limited scope and manner of proper re-examination is well recognized. Counsel for the witness may nonetheless improperly attempt to re-suscitate their witness with inappropriate re-examination questions, such as leading questions or questions that do not arise out of the cross-examination. You must object immediately to every improper question. If counsel persists, you cannot physically prevent them from doing so, but you must continually state your objection on the record and may insist that the disputed re-examination be taken on a separate transcript. Then, as a preliminary matter on the return of the motion or application, you can ask the judge to exclude the offending portions of the re-examination transcript.

A hypothetical civil case –
McHugh v Ruckus Vacations Inc.

Elaine and Winston McHugh, a retired couple in their seventies, have instituted a claim[10] in nuisance and brought a motion for an interlocutory injunction to restrain the neighbouring defendant's cottage rental practices.

The McHughs enjoyed their place up north on Tullywinney Lake for decades until their neighbours on the quiet little bay sold their cottage in the fall of 2023. The new owner – who turned out to be Ruckus Vacations Inc. – immediately tore the neighbours' cottage down and started building a massive new structure, which the McHughs have dubbed the "Palace," and which features five bedrooms, all with ensuites. On the circular bay, the McHughs now have in view the Palace, plus a substantial new boathouse with a large roof deck, and an expanded dock that can accommodate several large powerboats.

All residential properties on the shores of Tullywinney Lake are zoned "Waterfront Single-Family Residential." The Palace was ultimately completed in March 2025. Now it is the middle of summer. As Mrs. McHugh tells it, the comings and goings of multiple different groups of week-long renters have been relentless. They make noise from morning to night. The jet skis and powerboats roar in and out of the bay, and dock parties regularly start before noon. The McHughs have gone over numerous times to complain to various renters, but to little avail. The sole director of Ruckus Vacations Inc. is Melvin Ruckus. Mrs. McHugh has sent Ruckus several letters of complaint and received no response. The McHughs have also complained to the provincial police about what they contend have been violations of the municipality's noise by-law, but the police are almost always too busy to respond, and never on a timely basis.

The affidavit of Elaine McHugh

Mrs. McHugh recounts in her affidavit the story summarized above. Attached as an exhibit to her affidavit is the paper record (with referenced videos) that she has kept of the disturbances about which she and her husband complained. An additional exhibit consists of clerk-certified copies (as proof under s 447.6(1) of the Ontario *Municipal Act*) of the applicable municipal zoning and noise by-laws.[11] The final exhibit is a certified copy of the title search for the Ruckus property, which reveals that the property has not been encumbered by a mortgage since it was purchased.

The affidavit of Melvin Ruckus

The defendants, Ruckus Vacations Inc. and Melvin Ruckus, filed the affidavit of Mr. Ruckus in response. The Ruckus affidavit includes the following paragraphs:

1. I am the president of the defendant Ruckus Vacations Inc., which owns the property on the bay alongside the plaintiffs' cottage on Tullywinney Lake.
2. I live in Toronto, where I am employed in the equity investment industry.
3. I first went to Tullywinney Lake with my parents as a young child. I have vacationed there frequently ever since. I decided in 2023 to build the cottage of my dreams, before prices on the lake escalated any further. Ruckus Vacations Inc. was incorporated for that very purpose. I hope one day to get married and start a family, who will then be able to call this new cottage their own. In the interim, renting the cottage most of the time is a sensible and economical thing for me to do, particularly having in mind the exorbitant cost of borrowing these days to finance cottage construction.
4. I have read the affidavit of Elaine McHugh. I regret that she and her husband have found the activities of the people who rent my cottage disruptive. The McHughs' distress is perhaps understandable, given their good fortune in being able to enjoy such a quiet bay for so many years. However, I feel it is fair to say that the McHughs should have no special entitlement to be insulated from the boating and other convivial activities they complain about – activities which commonly take place all over Tullywinney Lake. They themselves have a motorboat, which they use from time to time.
5. I personally oversee the renting of my cottage, and I also employ an agent, Ronald Crowley, who lives not far from the cottage and acts on my instructions. I am advised by Mr. Crowley and verily believe that he ensures that each new group of renters receive a copy of the township's noise by-law and the specific code of conduct I expect from renters while

they are visiting. Mr. Crowley has assured me that he contacts renters immediately whenever complaints about noise or other disruption come to his attention.

Preparing for the out-of-court cross-examinations of Mrs. McHugh and Mr. Ruckus

This is the kind of litigation that can get away from both counsel, end up costing their clients a small fortune, and bring an unsatisfactory result even for the successful party. Experienced counsel will recognize the signs and make early efforts to negotiate a workable resolution for both sides.

That said, if a resolution is not at hand, cross-examinations on the affidavits may well be necessary. The first question counsel must ask themselves is whether there is a need to cross-examine, and if so to what extent. There is always the prospect in not cross-examining that opposing counsel will repeatedly refer in their factum and oral submissions to the "unchallenged and uncross-examined upon" evidence of their witness, which can feel like a dagger to the heart.

If you do cross-examine, as you likely would have to here, control is the key. You are not embarking on a discovery. The idea is to conduct a cross-examination that contemplates making your points with focused precision.

The cross-examination of Elaine McHugh

Mrs. McHugh has the potential to be a dangerous witness on cross-examination. She will be eager at every opportunity to emphasize how intrusive the renters' disruptions have been. On the record as filed, there is a live issue as to whether her affidavit evidence makes out a tenable case of nuisance. The law of nuisance requires demonstration of "an act that substantially and unreasonably interferes with the use or enjoyment of land" in the context of all the circumstances.[12] Substantial compliance by the renters with the municipality's permissive noise by-law may arguably be sufficient to meet this test in a busy vacation area. On cross-examination, this will be one of the points to be explored, albeit with caution. Importantly, the local municipality's noise by-law prohibits "yelling, shouting, hooting, whistling, singing or other similar human sound in any part of the Township between 23:00 hours (11:00 p.m.) and 07:00 hours (7:00 a.m.) the following day."

The excerpt from Mrs. McHugh's cross-examination below is designed around what the by-law actually prohibits:

Q. Mrs. McHugh, I gather at some point early on you felt you needed to start keeping a careful record of the activities at the Ruckus cottage?
A. Correct.
Q. And that is what Exhibit A to your affidavit is – a careful record, is that fair?
A. I certainly hope so.
Q. I gather you were at your cottage all summer through Labour Day?
A. Yes.
Q. The first entry on this record is June 7, 2025, and the last one is September 6, 2025. That's about 92 days by my count. Is that correct?
A. That sounds correct.
Q. Am I right that you only made entries of any kind in this record on 19 separate days?
A. Let me look at it … Yes, I guess that's right.
Q. May I ask what time you and your husband normally get up and go to bed?
A. It varies of course, but generally we are up by 8 a.m. and in bed by 10 p.m. or so.
Q. Your careful record even includes a time of day for each entry?
A. Yes, it does.
Q. There are no daily entries before 7 a.m., right?
A. I think that's right – we are never up that early.
Q. And you've made just a single entry for after 11 p.m. and that was on July 1, Canada Day?
A. Yes. There was a mob of them across the bay and they set off fireworks for what seemed like forever. We could not get to sleep until almost midnight.

This exchange on cross-examination has seriously weakened the McHughs' nuisance claim. Experienced counsel might decide not to engage Mrs. McHugh any further – in particular, not speculating with her over whether a family-oriented rental operation more in line with the zoning by-law might result in materially less disturbance.

The cross-examination of Melvin Ruckus

Counsel must always consider including in the Notice of Examination specific types of documents for the witness to bring to the cross-examination. However, doing so must be balanced against the tactical risk that the demand for such documents will give the witness a heads-up about a line of questioning, when it would be preferable to surprise the witness and elicit a spontaneous (and hopefully truthful) response. Balancing these considerations in the Ruckus case might lead counsel not to ask in advance for documents concerning any other properties owned by Ruckus Vacations Inc. (which a search reveals was incorporated in 2019, some three years before the Ruckus Palace property was acquired), but to ask in the notice and cover letter for copies of all promotional material used to attract renters, and the company's rental records.

Counsel's overarching theme throughout the cross-examination will be to demonstrate that the Ruckus Palace is a commercial investment (and maybe not Ruckus's first) in a vacation rental business. It is not designed or intended for single families, nor for his future personal use, contrary to what he says in his affidavit. It is more akin to a party place, and far more likely to cause disturbances than if it were occupied by a single family.

The following excerpt from the cross-examination of Mr. Ruckus explores potential contradictions arising out of paragraph 3 of the Ruckus affidavit. Counsel will tread carefully – a few open-ended questions are unavoidable to "dip a toe in the water" – and explore whether the potential for contradictions and admissions is worth pursuing:

Q. My research tells me that you are the sole principal of Ruckus Hedge Inc.?
A. Yes, that's correct.
Q. According to your website, Ruckus Hedge Inc. "operates a high-risk equity investment fund currently valued in excess of one billion dollars."
A. Yes. We have been quite successful.
Q. In 2019, why did you incorporate Ruckus Vacations Inc.?
A. I am a businessman.
Q. I know that. What's the answer to my question?

A. I decided to branch out.
Q. What do you mean by "branch out"?
A. Vacation rentals are a rapidly exploding area of business, and I decided to test the waters.
Q. How did you "test the waters," as you put it?
A. The company bought an existing cottage compound which occupies an entire island on Lake Muskoka. It cost me a fortune.
Q. I gather you had the funds available?
A. I did, indeed. Or Ruckus Vacations Inc. did, to be more precise.
Q. And do you rent the Lake Muskoka property out regularly?
A. We do. It is in high demand for social events.
Q. And what was the company's next endeavour?
A. I got sidetracked as a result of COVID, but then I went after this property we are talking about here on Tullywinney Lake.
Q. Which you also paid cash for, I gather?
A. Yes.
Q. Including the entire cost of construction?
A. You bet. No debt.

Take-aways from the cross-examinations

Experienced counsel for the McHughs would almost certainly see Ruckus's boastful answers as unequivocally at odds with the contents of paragraph 3 of his affidavit, and they would likely forego further confrontation during the cross-examination on that issue (and perhaps other issues). The McHughs' counsel would look forward to arguing on the return of the motion that not only has Ruckus's credibility been irreparably impeached, but on the totality of the evidence Ruckus has been revealed as a cottage neighbour's worst nightmare, causing a nuisance at law for his neighbours. Hopefully for the McHughs' counsel, this may overcome the limitations in his own clients' evidence on the alleged infringement of the noise by-law, which is an important element of their nuisance claim.

Notes

1. Such as examinations of non-affiant witnesses under Rule 39.03 of the Ontario *Rules of Civil Procedure*.
2. For more on building to an unavoidable concession or incredible denial during cross-examination, see Robert S Harrison and Richard B Swan, "How to Cross-Examine Without Arguing with the Witness: Building a Foundation for 'Incredible Denials'" *The Advocates' Journal* (Summer 2024) 43:1
3. For more on the preparation and organization of a cross-examination brief, see Robert S Harrison and Richard B Swan, Skillful Witness Examinations in Civil and Arbitration Cases (Toronto: Thomson Reuters, 2023), §§ 6:13–15.
4. The authors prefer to cross-examine adverse witnesses in the formal austerity of a court reporter's office.
5. *Yan v Nadarajah*, 2017 ONCA 196 at paras 15 and 16.
6. Harrison and Swan, *Skillful Witness Examinations*, *supra* note 3, ch 3.
7. O'Halloran JA famously expressed the matter in *Faryna v Chorny*, 1951 CanLII 252 (BCCA), pp 356–57, thusly:

   > The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gaugedsolely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions … The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses.

8. *R v M.G.*, 1994 CanLII 8733 (ONCA) at para 27.
9. *Shukla v Fenton*, 2021 ONSC 1340.
10. Counsel moving for injunctive relief must be careful to include in the statement of claim a prayer for interim, interlocutory, and permanent injunctive relief, or they may run afoul of the decision of the Ontario Divisional Court in *Cellular Rental Systems Inc. v Bell Mobility Cellular Inc.*, 1995 CanLII 10638 (ONSC).
11. Thereby avoiding any issue with Rule 39.02. There is authority to the effect that a court will not take judicial notice of a by-law: *Regina v Clark*, 1973 CanLII 760 (ONSC).
12. *Tock v St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 SCR 1181.

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