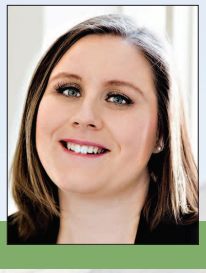
HEADNOTES & FOOTNOTES
Titres et rubriques

Volume 54 No./n° 7 / August/September / août/septembre 2022



President's Message

By Tanya Keller

September reminds me of my first day at Robson Hall. At the time, I knew no other lawyers. I joined everything, of course, including the Manitoba Bar Association. I, as I am sure many of you, was still wondering how I tricked these people into letting me into law school. I barely made it, I figured, but now that I was in, I was set for life. All my hard work had already paid off and I could finally relax. I had made it… and then reality set in, and I was going to need some help.

My first real involvement with the MBA was as the Summer Student in 2007. I then joined the Law Day Committee, the Executive of the Women Lawyers' Forum Section, eventually becoming Co-Chair and the representative on the National Women Lawyers' Forum Section. The same year, I became a Council member. I ran for the Executive at the end of my first term and am honoured to be your incoming President for the 2022-2023 year.

Becoming more involved with the MBA has allowed me to give back to my community, and mentor law students to pay forward the mentoring I was fortunate to receive.

During my time with the MBA, I have met so many other lawyers from different firms and practice areas, students, judges, and professors, all passionate about the law and the MBA. I have learned so much from all the connections I have made. Becoming more involved with the MBA has allowed me to give back to my community, and mentor law students to pay forward the mentoring I was fortunate to receive. I have seen the influence the MBA and CBA can have on topics of importance to our members, like access to justice and the promotion of equality, which exemplify the best qualities our profession has to offer.

In that regard, I am mindful that this edition of *Headnotes & Footnotes*, although coming out at the beginning of August, will be the last edition you receive before our second National Day for Truth and Reconciliation in Canada on September 30, previously known as "Orange Shirt Day". I first learned about "Orange Shirt Day" when my oldest daughter was asked to wear an orange shirt in Kindergarten. I was caught empty handed and had no idea what it was about.

When my twins started Kindergarten, I was determined they were all going to have orange shirts from an Indigenous-owned business. They told me the story about how excited Phyllis was to wear her orange shirt, and how the mean teachers at her school took it away from her and wasn't that awful?! I know the stories get much worse from there and that one day they will learn the whole story. Their education though had far surpassed mine, so I was happy to have an opportunity to take the PATH series offered by the Canadian Bar Association with my fellow Executive Committee members and MBA staff in the Winter of 2021.

The PATH series is available for purchase for all CBA members, and I highly recommend it. Please do not let September 30, 2022 pass as another day off, another long weekend. Last year, I took my family, my mother in-law and a couple of neighbourhood children to the Manitoba Museum where they had special exhibits put up to honour our first National Day for Truth and Reconciliation. I urge you all to take the time to do something to learn more about our Residential Schools, the Sixties Scoop, and Day Schools.

I also want to take this opportunity to thank Ian Scarth for his dedication to the MBA over the past two years in his role as President. He has been a great leader and a great friend. I also look forward to continuing to work with Jason Gisser, Jessica Schofield, as well as our new Executive member, Stacey Soldier (who will be the first Indigenous woman to be President in our history in the 2025-2026 year). Thanks to Michelle Falk, Melissa Tannahill and Chelsey Tait for keeping everything running smoothly.

I am always glad to hear from you, either by e-mail at tkeller@sternatmanaigre.com or by phone at 204-808-1100 EXT 108.

THE MANITOBA BAR ASSOCIATION
A Branch of the Canadian Bar Association
L'ASSOCIATION DU BARREAU DU MANITOBA
Une Division de L'Association du Barreau canadien

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Les opinions exprimées dans *Titres et rubriques* sont celles des auteurs et ne reflètent pas nécessairement celles de l'Association du Barreau du Manitoba.

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CBA MEMBERS' RATES:

Supplied artwork in PMT or electronic format. Electronic format must be done in QuarkXpress or supplied as a PDF. Please supply file, fonts and any other linked images used in ads on a CD. Contact MBA for non-member rates.

Full Page (7.5" wide x 10")	$345
1/2 Page (7.5" wide x 5")	$195
1/4 Page (3.5" wide x 5")	$110
Business Card Ad (3.5 wide x 2")	$ 65
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Insert (Documents to be provided)	$265
Setting fee for display ads (one time only)	$ 26

G.S.T. Registration #R126095728

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NOTICE OF COUNCIL MEETINGS

of the Manitoba Bar Association

Thursday, September 29, 2022 – 1:30pm – 3:30pm (Location TBC)

Thursday, December 15, 2022 – Law Society of Manitoba,
200-260 St. Mary Avenue, Winnipeg, MB (tentative)
1:30pm – 3:30pm – MBA Council Meeting
3:30pm – 4:30pm – Joint meeting with Law Society Benchers
4:30pm – 5:00pm – Reception

Saturday, January 21, 2023 – Fairmont Winnipeg,
2 Lombard Place, Winnipeg, MB (tentative)
9:00am – 9:30am – Continental Breakfast
9:30am – 12:30pm – MBA Council Meeting

Thursday, June 8, 2023 (Location TBC)
1:30pm – 3:30pm – MBA Council Meeting
3:30pm – 5:00pm – Reception

PUBLICATION DEADLINE

The deadline for materials to be submitted for the next edition **(October 2022)** of *Headnotes & Footnotes* is **September 12, 2022.** Materials should be emailed to Melissa Tannahill at headnotes@cba-mb.ca.

DATE DE TOMBÉE

La date de tombée pour soumettre du matériel pour la prochaine édition « **octobre 2022** » de *Titres et rubriques* est **le 12 septembre 2022.** Veuillez envoyer votre matériel à l'adresse courriel de Melissa Tannahill : headnotes@ cba-mb.ca.

Notices to the Profession / Avis aux avocats

NEW MEMBERS

The Canadian and Manitoba Bar Association welcomes the following new members:

Peter Aiello - D'Arcy & Deacon LLP
Lexi Janovcik - Taylor McCaffrey LLP (Articling Student)
Alex Lam - Taylor McCaffrey LLP
Paul Monnin - Simmonds & Associates (Articling Student)
Benjamin Nkana Bassi - Nkana Bassi Legal Services
Melissa Serbin - Cochrane Saxberg Law
Funmilayo Taiwo - Bim Akin Law Office
Nikhilesh Verma - Thompson Dorfman Sweatman LLP (Articling Student)

CHIEF JUSTICE CHARTIER RETIREMENT GALA

Tickets are now available for the Thursday, October 27, 2022 Retirement Gala in honour of Chief Justice Chartier. Tickets can be purchased either individually or by the table (10 seats) through the Law Society of Manitoba's website. Here is a link to where you will find them: https://educationcentre.lawsociety.mb.ca/events/retirement-gala-for-the-chief-justice-of-manitoba-richard-chartier/.

Although tickets can be purchased and paid for online, if you have trouble accessing the site, you are welcome to contact Kirsty Hyduk at 204-926-2035.

The planning committee is very excited for this event. Seating will be limited, so please consider securing your ticket(s) at the earliest possible time. We don't want anyone who would like a ticket to find themselves without one. If you have any questions, you may reach the planning committee by contacting Aimee Fortier at aimee.fortier@gov.mb.ca.

GALA DE RETRAITE TO M. LE JUGE EN CHEF CHARTIER

Les billets sont maintenant en vente pour le gala de retraite qui aura lieu le 27 octobre 2022 en l'honneur du juge en chef Chartier. Vous pouvez vous les procurer individuellement ou par table (10 places) sur le site Web de la Société du Barreau du Manitoba en cliquant sur l'hyperlien suivant : https://educationcentre.lawsociety.mb.ca/events/retirement-gala-for-the-chief-justice-of-manitoba-richard-chartier/.

Il est possible d'acheter les billets en ligne, mais si vous n'arrivez pas à accéder au site Web, nous vous invitons à communiquer avec Kirsty Hyduk au 204 926-2035.

Le comité de planification a très hâte à cette soirée. Comme les places sont limitées, veuillez prévoir l'achat des billets le plus tôt possible. Nous voulons que chaque personne désireuse de participer à la soirée puisse se procurer un billet. Si vous avez des questions, vous pouvez joindre le comité de planification en communiquant avec Aimee Fortier à aimee.fortier@gov.mb.ca.

MANITOBA COURT OF QUEEN'S BENCH – MASTERS

COVID-19 UPDATE AND NEW PRACTICES FOR THE FALL OF 2022

There have been Notices issued by the Manitoba Court of Queen's Bench Masters on March 17, 2020, April 7, 2020, April 24, 2020, May 11, 2020, September 1, 2021, January 15, 2022 and March 1, 2022. While these notices continue to govern practice before the masters through this summer, they will be replaced by this notice in the fall.

THE NEW PRACTICES NOTED BELOW WILL BE EFFECTIVE IN FULL AS OF SEPTEMBER 6, 2022, AND WILL CONTINUE IN PLACE UNTIL FURTHER NOTICE OF THE COURT.

These changes reflect a balance between the continuing health and safety risks for court participants related to COVID-19, available court resources, proportionality, access to justice and the nature of the work of the masters. These changes reflect, as close as is possible, the changes announced by the Chief Justice of Manitoba, the Chief Justice of Court of Queen's Bench and the Chief Judge of the Provincial Court on February 25, 2022 and May 13, 2022.

As noted, this notice will be in full force and effect as of **September 6, 2022**, and will impact service requirements for all matters noted as moving back to full in person hearings. Until that time, the previous directions, in particular the notice of March 1, 2022, will continue to guide proceedings before the masters. These changes reflect the move back to in person hearings for all matters that are not set to appear in masters' chambers, with some exceptions in jurisdictions outside of Winnipeg as set out below. Concerning all other matters, as more specifically addressed below, there will be a continued use of available remote technology, with opportunity to implement flexibility in appropriate circumstances, on the request of the parties, and where resources allow. This notice will apply to practices in the masters' courts in every jurisdiction, except as expressly addressed below:

Maintenance Enforcement Dockets

These dockets recommenced on or about March 14, 2022, and will continue to run in all centres with no changes. Debtors who are summoned to appear on a Maintenance Enforcement docket in Manitoba are required to attend court in person. If debtors have legal counsel, counsel will also be required to appear in person. All COVID-19 Safety Procedures in force must be followed.

Child Protection Dockets

These dockets will return to in person dockets as of September 6, 2022, subject only to consideration of legal assistance continuing to be provided to impacted children without the necessity of a court appearance where circumstances permit, or as determined through further consultation with the bar. Persons or organizations required to be served in accordance with the relevant legislation must be served accordingly. Should circumstances arise which may justify proceeding with audio or video conferencing (where capacity allows) the parties must direct their request to the child protection coordinator, or scheduling coordinator as the case may be, for the consideration of the presiding master. Similarly, any matters that are appropriate to be brought to the attention of the presiding master prior to

Notices to the Profession / Avis aux avocats

the docket for review, should continue to be so brought in the same fashion and counsel should continue to file all relevant documents in advance of the docket wherever possible. This applies in all judicial centres in Manitoba serviced by the masters.

Masters' Civil and Family Uncontested List

The Masters' Uncontested Lists in all jurisdictions will continue to operate via teleconference, in the manner described in the Notice issued by the masters on May 11, 2020. The call-in number and ID for those matters on the daily uncontested list remain as follows for the Winnipeg Centre:

Toll-free dial-in number: 1-855-342-6455
Conference ID number: 5589296

In the event there are any questions with respect to scheduling of matters for outside of Winnipeg, counsel should contact the applicable Trial Coordinator:

Brandon:
Michelle Brown 204-726-7430
BrandonQBTrialCoordinator@gov.mb.ca

Dauphin:
Shauna Kachur 204- 622-2100
Shauna.Kachur@gov.mb.ca

Portage la Prairie:
Sherry Moffit 204-239-3383
Sherry.Moffit@gov.mb.ca

Morden:
Sheila Jeffers 204-822- 2880
Sheila.Jeffers@gov.mb.ca

Bankruptcy Dockets

The Bankruptcy dockets will return to full in person service as of September 6, 2022. All parties that are required to be served for the dockets on, or after that date, should be served appropriately for attendance at the relevant court facility. Should circumstances arise which may justify proceeding with a matter by audio or video conferencing (where capacity allows), requests can be made to the appropriate scheduling coordinator for the consideration of the presiding registrar. This applies in all judicial centres in Manitoba serviced by the masters/registrars.

Contested Motions

Contested motions, family and civil, will continue to be heard via teleconference in all judicial centres serviced by the masters unless alternate arrangements are made at least 10 days in advance, and at the discretion of the presiding master.

Uncontested Passing of Accounts and Hearings for Directions

All uncontested Passing of Accounts or Hearings for Directions in respect of references, accountings or any other matters, will continue to be heard via teleconference in all judicial centres serviced by the masters unless alternate arrangements are made at least 10 days in advance, and at the discretion of the presiding master.

Matters involving the provision of viva voce evidence

All matters in which the master will be hearing viva voce evidence will be set to proceed in person. Should circumstances arise which may justify proceeding by video conference (where capacity permits) or teleconference, counsel may direct such a request to the presiding master through the appropriate scheduling coordinator in the relevant jurisdiction.

Senior Master K. L. Clearwater

June 9, 2022

COURT OF QUEEN'S BENCH OF MANITOBA

AMENDMENTS TO THE COURT OF QUEEN'S BENCH RULES

On June 1, 2022, the Statutory Rules Committee of the Court of Queen's Bench approved changes to:

1. Queen's Bench Rules 74 and 75 (along with new forms) that deal with probate practice and contested estates;
2. The Court of Queen's Bench Tariff;
3. Queen's Bench Rule 4.10(1) dealing with access to family proceeding files.

The full text of the amendments in Manitoba Regulation numbers 68/2022, 69/2022, and 70/2022, can be located at: http://web2.gov.mb.ca/laws/regs/index_annual.php.

Probate Rules 74 and 75

The amendments to Probate Rules 74 and 75 required significant effort by the Surrogate Practice Committee of the court and various sub-committees that included Masters, Judges, court staff and members of the Bar. One of the primary objectives was to eliminate jargon and use plain language to make the Queen's Bench Rules more understandable to members of the public and members of the profession. The objective was not to overhaul the existing probate practice in Manitoba, but rather to modernize the language and terminology in the rules that govern Probate practice. The new rules and forms are gender neutral and were drafted with a view to making them understandable to self-represented parties who are increasingly filing probate and administration applications.

The following is notable in the amended probate rules:

1. An extensive definition section is included to define some of the most commonly used terms in probate matters;
2. A "general requirements" section sets out a specific list of all the documents and forms that must be filed in the different kinds of probate and administration applications. Previously these requirements were set out throughout Queen's Bench Rule 74. They are now contained in a single provision for ease of reference;
3. There are now clear explanations for less common applications like double probate and resealing of foreign grants;
4. The Forms now spell out the limitation our court faces in dealing with estates governed by the *Indian Act*; covers more kinds of assets that are commonly included in estate inventories; addresses different scenarios for wills that have unattested alterations or interlineations that are now reflected in an affidavit

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of condition (formerly affidavit of plight and finding) and creates certain new forms including the double probate form; and

5. Queen's Bench 75 (contested estates) contains a significant change, insofar as it gives judges broad discretion to make orders when a contested estate matter first appears on the civil motions list or at any time thereafter. The discretion includes the ability to order that a matter may continue as an action and that it proceed to a pre-trial conference. New parties can also be added to the action and service can be ordered on any party that might have an interest in the estate.

The new probate rules and forms come into force on **October 1, 2022**.

Court of Queen's Bench Tariff

The issue of amendments to the Court of Queen's Bench Tariff was first addressed by the Civil Practice Committee. The recommendation from the Civil Practice Committee was made after consultation with the profession and after input from the Family Division to include new steps that were not specifically covered under the existing tariff.

The existing party and party costs scale is intended to equate to approximately 60% of the reasonable counsel fee in a typical case. The amendments to the tariff approved by the Statutory Rules Committee include:

1. An across the board tariff increase of approximately 25%;
2. The amount for preparation for trial is increased to the same amount as the lawyer's fee at the trial of an action (item (r));
3. A compensable tariff item is added for written argument following trial when such written argument is directed by the judge, in an amount equal to 33% of the amount allowed per half day of trial;
4. The addition of new tariff items for triage conferences, prioritized hearings and contested emergent motions and motions before the Master to compel a party to complete pre-requisites.

The amended Court of Queen's Bench Tariff comes into force on **July 1, 2022** and applies to any step in a proceeding that takes place on or after July 1, 2022. For any step in a proceeding that took place before that date, the costs are to be assessed based on the previous tariff.

Queen's Bench Rule 4.10, Access to Family Proceeding Files

Since passing amendments to the Queen's Bench Rules respecting access to family proceeding files, the Statutory Rules Committee approved a minor change to Queen's Bench Rule 4.10(1)(f) to add the lawyers and staff with the Manitoba Prosecution Service and the Public Guardian and Trustee to the list of parties that are entitled to access family proceeding files.

The Honourable Justice James Edmond
Chair, Queen's Bench Rules Committee (Manitoba)

June 16, 2022

COURT OF QUEEN'S BENCH OF MANITOBA

DISTRIBUTION OF WRITTEN COURT OF QUEEN'S BENCH JUDGMENTS

Effective June 30, 2022, the present policy that judgments are not released for publication on the website or with publishers until three days after they have been released to counsel or a self-represented litigant, will be shortened to 24 hours or the next business day. It is expected that within that timeframe, any errors will be identified and reported to the judge in question.

This change in policy reflects an enhanced access to justice.

This Practice Direction comes into effect **June 30, 2022**.

The Honourable Chief Justice Glenn D. Joyal

Court of Queen's Bench (Manitoba)

June 24, 2022

PROVINCIAL COURT OF MANITOBA (WINNIPEG CENTRE)

2PM TRIALS PILOT PROJECT

On December 15, 2016, we announced a 2PM Trials Pilot Project. Over the years, there has been a decreasing demand for 2PM trials and preliminary inquiries. While we will continue to schedule 2PM trials if requested by counsel, the dates will not be posted to the website. If counsel wish to set a 2PM trial, they should contact the **Early Disposition Coordinator** at earlypcdispos@gov.mb.ca, who will provide counsel with available dates to schedule the matter. This will increase our flexibility to use court time for 2PM trials, other half-day proceedings or dispositions in response to the demand for those proceedings, and to maximize the efficiency of court scheduling.

The Honourable Associate Chief Judge Anne Krahn
Provincial Court of Manitoba

June 16, 2022

PROVINCIAL COURT OF MANITOBA

PRISONER TRANSPORT, IMPOSITION OF A PENITENTIARY SENTENCE

The Directive of the Court dated, February 10, 2010, required in person appearances by persons potentially facing the imposition of a penitentiary sentence. The evolution of video technology and public acceptance of video appearances for court matters, including requests from accused persons to appear by video, have informed the modification of this directive.

The Court continues to recognize the value of "in-person" appearances but also recognizes video appearances often provide an equivalent experience and reduces the inconvenience of transport. Effective immediately, a person can appear by video for the imposition of a penitentiary sentence, if judicial permission is sought at least three days in advance. In seeking permission for a person to appear by video, counsel

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should indicate whether the accused person is consenting to the video appearance, the position of counsel opposite and any other reasons in support of the request.

The Honourable Chief Judge Margaret Wiebe

Provincial Court of Manitoba

June 22, 2022

COUR PROVINCIALE DU MANITOBA

TRANSPORT DES DÉTENUS, IMPOSITION D'UNE PEINE DE DÉTENTION DANS UN PÉNITENCIER

La directive de la Cour datée du 10 février 2010 exigeait la comparution en personne des personnes susceptibles de se voir imposer une peine de détention dans un pénitencier. L'évolution de la technologie vidéo et l'acceptation par le public des vidéo comparutions pour les affaires judiciaires, y compris les demandes de comparution par vidéo de la part des accusés, ont influencé la modification de cette directive.

La Cour continue de reconnaître la valeur des comparutions « en personne », mais admet également que les vidéo-comparutions offrent souvent une expérience équivalente et qu'elles réduisent les inconvénients du transport. À compter d'aujourd'hui, une personne peut comparaître par vidéo pour l'imposition d'une peine de détention dans un pénitencier, si une autorisation judiciaire est demandée au moins trois jours à l'avance. En demandant l'autorisation de faire comparaître une personne par vidéo, l'avocat doit indiquer si la personne accusée consent à la comparution par vidéo, la position de l'avocat adverse et toute autre raison à l'appui de la demande.

La juge en chef Margaret Wiebe
Cour provinciale du Manitoba

Le 22 juin 2022

The Distinguished Service Award

Call for Nominations for the 2023 Distinguished Service Award of the Manitoba Bar Association

This award is presented to a member of the Bench or Bar who exemplifies the ideals of service to the legal profession and the community. Members of the current Executive Committee of the Manitoba Bar Association are not eligible.

Deadline for nominations is 4:00pm on Friday, September 23, 2022. Nominations, which should include a copy of the candidate's curriculum vitae and a cover letter outlining the reasons why the candidate should be selected, may be emailed to the MBA Office to the attention of Ian Scarth at admin@cba-mb.ca.

An Ad Hoc Committee of MBA Past-Presidents will review the nominations received and make a recommendation, to the MBA's Executive Committee, regarding the recipient of the 2023 Distinguished Service Award.

Past Recipients include:

2022
Douglas Finkbeiner, Q.C.
2021
Donna Miller, Q.C.
2020
Chrys Pappas, Q.C.
2019
Justice Brenda Keyser
2018
K. Eleanor Wiebe, Q.C.
2017
J. Guy Joubert
2016
Justice Murray Sinclair
2015
Justice Freda Steel
2014
Alan Scarth, C.M., Q.C.
2013
Justice Marshall Rothstein
2012
Judge John Guy
2011
Roland Penner, C.M., Q.C.
2010
Justice Sylvia Guertin-Riley
2009
Judge Ronald J. Meyers
2008
David Matas
2007
Professor D. Trevor Anderson, Q.C.
2006
Dr. Arthur Mauro, O.C., O.M., Q.C.
2005
The Honourable Alfred Monnin, Q.C.
2004
The Late Israel Harold Asper, O.C., Q.C.
2003
The Honourable Benjamin Hewak
2002
Yude M. Henteleff, Q.C.
2001
Martin H. Freedman, Q.C.
2000
Justice Ruth Krindle
1999
Chief Justice Richard J. Scott
1996
Justice Charles R. Huband
1995
Clifford H.C. Edwards, Q.C.
1994
Harold Buchwald, C.M., Q.C.
1993
J.F. Reeh Taylor, Q.C.
1992
A. Lorne Campbell, Q.C.
1991
Donald A. Thompson, Q.C.
1990
G. Campbell MacLean, Q.C.
1989
Frank O. Meighen, Q.C.
1988
To Ruth Matas in memory of the Honourable Roy Matas
1987
The Honourable Frank Muldoon
1986
The Honourable Samuel Freedman
1985
Harry Walsh, Q.C.
1984
Judge Maxwell Cohen
1983
Keith Turner, Q.C.
1982
The Honourable R.G.B. Dickson

Section & Business News / Activités des sections

CHILD & YOUTH LAW SECTION
CRIMINAL JUSTICE SECTION
NOTICE OF JOINT ONLINE MEETING

DATE: Wednesday, August 24, 2022

TIME: 12:00 Noon – 1:30pm

LOCATION: Zoom Video Conference

TOPIC: Immigration Consequences in Criminal Law

SPEAKER: David Davis, Davis Immigration Law Office

While this session will be geared towards new criminal law practitioners discussing things to know about immigration implications with convictions, all Section members are invited to attend.

Please RSVP (PRE-REGISTRATION IS REQUIRED) to the Manitoba Bar Association online at www.cbapd.org. The link to join the meeting will be sent the morning of the meeting.

Attendance at this MBA Section meeting can be applied towards your Law Society of Manitoba's Continuing Professional Development requirement for a maximum of 1.5 hours.

Wendy Martin White
Co-Chair, MBA Criminal Justice Section
Co-Chair, MBA Child & Youth Law Section
Martin White & Associates
Ph: 204-415-9995
wendy@wmwlaw.ca

Bryton Moen
Co-Chair, MBA Criminal Justice Section
Manitoba Justice - Prosecutions Service Division

Riley Nolan
Co-Chair, MBA Child & Youth Law Section
Tapper Cuddy LLP
Ph: 204-944-3247
rnolan@tappercuddy.com

CHILD & YOUTH LAW SECTION
NOTICE OF ONLINE MEETING

DATE: Thursday, August 25, 2022

TIME: 12:00 Noon – 1:30pm

LOCATION: Zoom Video Conference

TOPIC: Best Practices in Custody Calls

SPEAKERS: Stacey Soldier, Cochrane Saxberg Law
Mark Wasyliw, Bueti Wasyliw Wiebe Law Corporation
Wendy Martin White, Martin White & Associates

Please join the Child & Youth Law Section for a lunch and learn session where we will be talking about custody calls in general, special youth considerations and specific advice in certain areas: impaired driving, sexual assaults and murders. We will discuss best practices and will provide a checklist and handouts.

Please RSVP (PRE-REGISTRATION IS REQUIRED) to the Manitoba Bar Association online at www.cbapd.org. The link to join the meeting will be sent the morning of the meeting.

Attendance at this MBA Section meeting can be applied towards your Law Society of Manitoba's Continuing Professional Development requirement for a maximum of 1.5 hours.

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Riley Nolan
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rnolan@tappercuddy.com

CCCA SECTION
NOTICE OF ONLINE MEETING

DATE: Thursday, September 29, 2022

TIME: 12:00 Noon – 1:30pm

LOCATION: Zoom Video Conference

TOPIC: Reconciliation: Next Steps

SPEAKERS: Yvan Larocque, Miller Titerle + Company
Jessica Saunders, Saunders Delaronde Law

Join us for this CCCA session intended to help you continue learning about this important topic. Our session in October 2021 was focused on what Reconciliation means and why it's important. For this session, Yvan Larocque and Jessica Saunders will be joining us to discuss examples of public and private sector activities advancing Reconciliation. The session will expand on the October 2021 session by continuing to explore what Reconciliation means to different organizations and what steps individuals can take.

Please RSVP (PRE-REGISTRATION IS REQUIRED) to the Manitoba Bar Association online at www.cbapd.org. The link to join the meeting will be sent the morning of the meeting.

Attendance at this MBA Section meeting can be applied towards your Law Society of Manitoba's Continuing Professional Development requirement for a maximum of 1.5 hours.

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FOR THE PROFESSION

CBA News



Manitoba Branch delegates at the CBA President's Dinner in Ottawa on June 22, 2022. From left to right: Ian Scarth (MBA Past President), Michelle Falk (MBA Executive Director), John Stefaniuk (CBA 2nd Vice President) and Brad Regehr (CBA/MBA Past President).

2022-2023 Board of Directors

Eight new members of the CBA Board of Directors, from British Columbia, New Brunswick, Nova Scotia, Northwest Territories, Prince Edward Island, Quebec, Nunavut and Yukon have been acclaimed. Click here for more information: https://www.cba.org/Who-We-Are/Governance/Board-of-Directors/Incoming-Board.

Help Wanted: Leaders Like You

Feeling inspired by the diverse women judges highlighted in our Madam Justice project? Looking for a seat on the federal bench? Interested in the job of Ombudsman for Victims of Crime? Or that of Deputy Registrar of the Supreme Court of Canada? Well step right up – those positions and more are open, all you need to do is apply. Check out federal appointment opportunities at https://www.canada.ca/en/privy-council/topics/appointments/governor-council.html and open positions on the bench at https://www.fja.gc.ca/appointments-nominations/index-eng.html. The government considers bilingual proficiency and diversity in filling these positions. Are they looking for you? Look here for provincial and territorial opportunities: https://www.cba.org/Our-Work/cbainfluence/Provincial-and-territorial-opportunities.

CBA Toolkit on Retainers and Fees

The Canadian Bar Association introduced a comprehensive new toolkit to provide Canadian lawyers in private practice with commentary, resources and best practices with respect to the financial aspects of retainers. The Toolkit also highlights some of the ethical obligations that arise with respect to retainers and fees. Read more at: https://www.cba.org/Publications-Resources/Practice-Tools/Retainers-and-Fees-Toolkit.

Submissions

Protecting Solicitor-Client Privilege

The Canadian Bar Association supports the federal government's efforts to make the tax system fairer, President Stephen Rotstein writes in a letter to Deputy Prime Minister and Minister of Finance Chrystia Freeland. Provided lawyers can fulfil their duties to their clients with undivided loyalty. Read on at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/May/Protecting-solicitor-client-privilege.

Reining in Aggressive Tax Planning

The government of Canada is committed to making the tax system fair for everyone, it says in its Budget speeches. One of the tools it can use to reach that goal is to uncover aggressive tax planning schemes. The Canada Revenue Agency distinguishes "aggressive" tax planning from the legitimate kind in that the former is a way to get around the intent of the law. The Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, in a letter to Finance Canada, comment on reportable and notifiable transaction proposals included in draft legislation designed to curb aggressive tax planning. More at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/May/Reining-in-aggressive-tax-planning.

To Better Protect Children

The Child and Youth Law Section of the Canadian Bar Association, in an update to the UN Committee on the Rights of the Child, says Canada continues to struggle with its compliance with the UN Convention on the Rights of the Child, or UNCRC. Read on: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/May/To-better-protect-children.

Considering a Vaccination Policy at the Federal Court

In a letter to Chief Justice Paul Crampton, the Federal Courts Bench and Bar Liaison Committee of the Canadian Bar Association outlines factors the Federal Court should take into account in considering a vaccination policy for in-person hearings. Find more at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/May/Considering-a-vaccination-policy-at-the-Federal-Co.

Expanding Equity

The federal government should consider expanding the definition of equity groups, and require employers to collect better data, to improve the *Employment Equity Act*. That is the essence of the message contained in a letter to the Task Force from the Sexual Orientation and Gender Identity Community Section, the Equality Subcommittee, the Labour and Employment Section and the Women Lawyers Forum of the Canadian Bar Association. Read on at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/June/Expanding-equity.

Improving the Post-Graduation Work Permit Program

International students are an important part of the solution to Canada's labour shortages. That is why the Immigration Law Section of the Canadian Bar Association, in a letter to Minister of Immigration, Refugees and Citizenship Sean Fraser, makes several key recommendations to improve the Post-Graduate Work Permit Program, or PGWPP. More at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/June/Improving-the-Post-Graduation-Work-Permit-Program.

Fairer, More Efficient Child Support Payments

The Family Law Section of the Canadian Bar Association provides more details about its recommendation that parents in shared care situations pay support to each other in accordance with their income. Find more at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/June/Fairer-more-efficient-child-support-payments.

CBA News

EIFEL Rules a Fundamentally New Approach

The Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, in a letter to Finance Canada, comments on Excessive Interest and Financing Expenses Limitation, or EIFEL, proposals that were included as part of the draft legislation that was released on February 4, 2022. Read more here: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/June/EIFEL-rules-a-fundamentally-new-approach.

Effective and Accountable Charities

The Charities and Not-for-Profit Law Section of the Canadian Bar Association supports Senate Bill S-216, the *Effective and Accountable Charities Act*. That is the essence of a letter to Deputy Prime Minister and Minister of Finance Chrystia Freeland endorsing the amendments proposed to the *Income Tax Act* in the bill. Full story here: https://www.cba.org/Our-Work/cbainfluence/Submissions/2022/June/Effective-and-accountable-charities.

Public Policy and Advocacy

Protecting Exploited Persons

The Municipal Law and Criminal Justice Sections of the Canadian Bar Association, in a letter to the Standing Committee on Justice and Human Rights, offer comments on the review of the *Protection of Communities and Exploited Persons Act*. Find more at: https://www.cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2022/May/Protecting-exploited-persons.

Improving Access to Justice in French

In a letter addressed to David Lametti, Minister of Justice and Attorney General of Canada, the Canadian Bar Association's French Speaking Common Law Members Section and Judicial Issues Subcommittee recommend improving training for federal judicial advisory committee members. Specifically, the letter suggests adding training on their respective jurisdictions' experiences and needs regarding access to justice in French. Read on: https://www.cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2022/June/Improving-access-to-justice-in-French.

Reiterating Support for MAiD

When Medical Assistance in Dying, or MAiD, legislation was adopted by Parliament in March 2021, a Special Joint Committee was appointed to review the Criminal Code and its application to issues relating to mature minors, advance requests, mental illness, the state of palliative care in Canada and the protection of Canadians with disabilities. The End of Life Working Group of the Canadian Bar Association has demonstrated an abiding commitment to assist legislators with clarifying the law regarding end-of-life decision making and stressing the importance of a pan-Canadian approach. In a letter to the Special Joint Committee on Medical Assistance in Dying, or MAiD, the Working Group reiterates the CBA's positions on MAiD for persons with mental illnesses, mature minors and advance requests for MAiD. More at: https://www.cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2022/June/Reiterating-support-for-MAiD.

CBR New and Old

The Canadian Bar Review has reached an exciting milestone, with the publication of the first Issue of its 100th Volume! The bilingual, peer-review journal's latest offerings include an article on recognizing Indigenous Law (https://cbr.cba.org/index.php/cbr/article/view/4733), a paper on the evolution of life sentences for second degree murder (https://cbr.cba.org/index.php/cbr/article/view/4735), an intriguing piece on what obligations lawyers have to report a child in need of protection in the context of the future harm exception to solicitor-client privilege (https://cbr.cba.org/index.php/cbr/article/view/4734) and an overview of the duty of honest performance (https://cbr.cba.org/index.php/cbr/article/view/4736) or, as the author puts it, "a tort dressed in contract clothing." French content consists of an article on the invocation of force majeure by creditors (https://cbr.cba.org/index.php/cbr/article/view/4737). To mark the first 100 years of the CBR, we look back at a century of scholarship with its current editors (https://nationalmagazine.ca/en-ca/articles/law/in-depth/2022/a-century-of-scholarship).

Call for Nominations of Branch Officer – Equity Member-at-Large

The Branch Equity Member-at-Large is responsible for activities and initiatives of the Branch to ensure that it fulfils its commitment to equity, equality, diversity, and inclusion, including providing advice and analysis to the Branch on relevant and related issues.

A candidate for the Branch Officer position of the Branch Equity Member-at-Large will be appointed for a term of two years and may serve for a maximum of three terms. An incumbent Branch Equity Member-at-Large must stand for re-appointment after each two-year term.

The Chairs or Co-Chairs of the Aboriginal Law Section, Equality Issues Section, SOGIC, Women Lawyers' Forum Section and the Young Lawyers' Section shall create an Appointment Committee of up to seven (7) members with one vote each, with the responsibility to appoint the position. The appointment shall be made by secret ballot, using a system of instant runoff voting without a separate runoff election.

Candidates for the position of Equity Member-at-Large may be nominated by submitting a nomination in writing, via mail or email. Nominations must be received by the Branch Executive Director by mail: 1500-444 St. Mary Avenue, Winnipeg, MB, R3C 3T1 or by email (mfalk@cba-mb.ca) ON OR BEFORE Friday, September 2, 2022 AT 4:00pm. The appointment will be announced during the Branch Council meeting on September 29, 2022.

Jason Gisser
Vice-President
Manitoba Bar Association

MBA EXECUTIVE COMMITTEE 2022/2023

(Effective September 1, 2022)



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(2nd Year of 2 Year Term)

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** Designated Voting Member of MBA Council*

*** Ex-Officio Member of MBA Council*

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J. Guy Joubert
CBA Past-President

Bradley D. Regehr
CBA Past-President

OTHER DESIGNATED VOTING MEMBERS OF COUNCIL

Eric Gagnon, *MLSA Representative*

To be elected in September, *CPLED Representative*

MBA Council Meeting Highlights

The Manitoba Bar Association Council held its annual meeting on June 2, 2022 at the RBC Convention Centre and via hybrid Zoom video conferencing, and discussed the following issues:

- Nick Slonosky, the MBA representative on the Legal Help Centre Board gave a report on the work of the Centre.
- Kevin Antonyshyn, the MBA representative on the Manitoba Law Foundation Board gave an overview of what the Foundation does and the grants they provide.
- Year end written reports were received from the following Sections: Alternative Dispute Resolution Section, Business Law Section, CCCA Section, Child & Youth Law Section, Constitutional/Human Rights Law Section, Criminal Justice Section, Environmental, Energy and Resources Law Section, Family Law Section, Immigration Law Section, Insolvency Law Section, Legal Research Section, Public Sector Lawyers' Section, Transportation Law Section, Wills, Estates and Trusts Section, Women Lawyers' Forum Section and Young Lawyers' Section.
- Ian Scarth, President, highlighted activities, meetings and events he has attended on behalf of the MBA. The MBA Strategic Priorities for 2022-2023 were presented and approved.
- Tanya Keller, Vice-President, highlighted activities, meetings and events she has attended on behalf of the MBA.
- Amended MBA Bylaws to include procedures for the nomination of a new Equity Member-at-Large and to update gender pronouns throughout the document were approved.
- Tanya Keller, Interim Secretary/Treasurer provided an analysis of the financial statements to April 30, 2022.
- Myers Norris Penney was appointed the auditor of financial statements of the Manitoba Bar Association for the fiscal year ended August 31, 2022.
- Tanya Keller, Interim Secretary/Treasurer presented the 2022-2023 budget. The budget was approved.
- Jessica Schofield, Director Membership, highlighted activities, meetings and events she has attended on behalf of the MBA.
- Jason Gisser, Director Advocacy & Public Relations, highlighted activities, meetings and events he has attended on behalf of the MBA.
- Cynthia Lau, Past President, highlighted activities, meetings and events she has attended on behalf of the MBA.
- John Stefaniuk, CBA Board Representative, provided a report highlighting the work on the CBA Board of Directors.
- Ian Scarth was presented with a stained-glass CBA logo for his service as President of the Manitoba Bar Association.
- An election was held for the Branch Officer – Director of Advocacy & Public Relations position and the successful candidate was Stacey Soldier.

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** designated non-voting member of MBA Council*

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Elected

Stacey Soldier, who was called to the Manitoba Bar in 2008 and is an Associate with Cochrane Saxberg LLP, has been elected to the position of Director of Advocacy & Public Relations of the Executive of the Manitoba Bar Association (MBA). Ms Soldier is currently a MBA Council member and a Member-at-Large of the Child & Youth Law Section. Ms Soldier will progress to Vice-President in 2024/2025 and ascend to the Presidency of the MBA in 2025/2026.

Member Spotlight: Joëlle Pastora Sala

Joëlle Pastora Sala is a franco-Manitoban and Nicaraguan lawyer who was called to the bar in 2014. She has been an MBA member since 2013. Joëlle's public interest practice focuses primarily on human rights and constitutional law, law relating to Indigenous people and environmental law.



What initially attracted you to become a lawyer?

I don't remember the exact moment I decided to become a lawyer. However, when I think back to what attracted me to the legal profession, a few moments in my life stand out (spoiler alert - most of them relate to my parents and trips I took to Nicaragua).

I was nine years old when I first traveled to Nicaragua. This trip represents my earliest memory of wanting to fight against injustices. Two particular stories come to mind from my first trip: (1) my father and I were approached in an ice cream shop by children who were homeless and were begging for food. I remember giving them my ice cream cone and asking my dad to buy them all lunch. My father still recalls how much I cried when we returned home later that day. I recall being deeply impacted by this interaction with extreme poverty and economic inequality; (2) during the same trip, I remember witnessing police officers severely beating two civilians with police batons. While I did not know it then, it was the first time I saw the intersection between (abuse of) power, oppression, poverty, and structural violence.

Second, as part of my undergraduate degree, I completed a three month practicum with an NGO working in one of the poorest and most dangerous neighborhoods of Managua, Nicaragua. During my practicum, I developed a deep respect for people at the grassroots (locally and internationally) who are assisting people in meeting their basic needs and supporting them in living a good life. It was during this trip that I solidified my desire to become a public interest lawyer because I wanted to create systemic change which would remove barriers to inclusion for folks who have been historically marginalized.

Lastly, I would say my overall passion for service and love for social justice comes from my parents. My mom (a franco-Manitoban) met my father when she was volunteering in Nicaragua in the early 1980s after the revolution. Shortly after, my father moved to Canada for love. They raised me with strong social justice values.

How did you come to work at PILC?

During my undergrad, I took a course called "Legal Processes" which was taught by professor Aimée Craft. At the time, Aimée was a lawyer at the Public Interest Law Centre (PILC). When I heard about PILC and Aimée's work, I immediately decided that is where I wanted to work. It sounded like, and remains, my dream job.

What do you find most rewarding about your work?

I consider myself very fortunate to work in my dream job at PILC. I am passionate about using the law as a tool to fight for systemic change in the interest of individuals and groups who have been historically marginalized and excluded. It has been such an honour for me to serve and learn from my clients such as adults and children with disabilities, First Nation knowledge keepers and organizations, and a variety of not-for-profit organizations.

As a public interest lawyer, I really enjoy working in multi-disciplinary teams and employing a variety of tools to achieve social justice whether it be through the community engagement, media/social media, letters to ministers, publications and conference presentations and the courts.

I am passionate about using the law as a tool to fight for systemic change in the interest of individuals and groups who have been historically marginalized and excluded.

I also really like the diversity of cases and clients whether it is fighting for: the equal respect of First Nation laws at the Supreme Court of Canada, the social inclusion of persons with disabilities in the provision of services and supports at Manitoba and federal human rights tribunals, and ending violence against Indigenous women and girls at the National Inquiry into Missing and Murdered Indigenous Women and Girls.

What do you value the most about your membership with the MBA?

My MBA membership allowed me early on in my legal career to become involved in and attend several professional activities. I became involved with the MBA Aboriginal Law Section as an articling student and eventually co-chaired the Section. This

Member Spotlight: Joëlle Pastora Sala *cont'd*

activity offered me an invaluable opportunity for networking both provincially and nationally. I attended meetings in Ottawa with federal government officials and was able to advocate for Canada to take meaningful actions on issues affecting Indigenous people, including on the issue of Missing and Murdered Indigenous Women and Girls.

I also had the opportunity to organize and co-chair the CBA Aboriginal Law Conference held in Winnipeg which allowed me to work with lawyers from across Canada to plan a national event and bring together several leaders in the Aboriginal law field. My MBA membership has also provided me with the opportunity to attend several presentations on a wide variety of topics affecting the public interest, fueling my constant desire to learn and feel inspired by other members of the profession.

If you could choose anyone to have as a mentor, who would you choose and why?

I have been really blessed with incredible mentors in my legal career, including lawyers and professors who took me under their wings in law school and later, my colleagues at PILC and other private firms in Winnipeg. I have also had a wonderful group of non-lawyers whom I consider my mentors offer me support throughout my career.

If I could add someone to my list of mentors, I would choose Justice Rosalie Abella. I have been a fan of Justice Abella for a long time. I recently attended a conference celebrating her legacy and was inspired by her body of work as well as her passion, authenticity, empathy, courage, and humility. Based on what I have heard, Justice Abella is a generous and encouraging mentor. She is a creative legal thinker with many accomplishments and several "firsts" - first pregnant judge, first judge who was a refugee, first Jewish woman to be a judge and the list goes on. Most importantly (from my perspective), Justice Abella's moral compass and vision for a better world (particularly for equity deserving groups) underpins everything she does. For those reasons, it would be an honour for me to consider Justice Abella a mentor.

Congratulations to the

2021-2022 Manitoba CPLED/PREP Program Students

Who received their call to the Bar in 2022

AHN, Seulmi
AIELLO, Adrianna
AIELLO, Franco
AKONG, Rebecca
AL FEKIH, Menal
BAILEY, Alexis
BANNATYNE, Tyson
BARBOUR, David
BAUCH, Stephanie
BAUER, Madlen
BHADORIA, Shilpa
BJORKLUND, Meghan
BLAIR, Reanna
BRAR, Sukhmenjit
BRECKMAN, Stephen
BRENNER, Erika
BUCHANAN, Reid
CAMPBELL, Larissa
CARLSON, Chanel
CERILLI-STANKEVICIUS, Clair
CHARACH, David
CHARLES, Dallas
CHRUSCH, Evan
CIPRICK, Emma
CLEVERLY, Conner
COMEGAN, Daphne
COOK, Emilie
CORNICK, Braeden
DAVIES, Victoria
DESAI, Pari
DHILLON, Amandeep
DJUISSI, Ruphine
DOWN, Chenoah
DRESSLER, Steven
FEKETE, Justin
FLAMAN, Kara
FRANZ, Hannah
FREDERICKSON, Cassandra
FREYNET-GANGÉ, Chloé
FRIESEN, Bethany
FUGA, Graham
GEDDES, Matthew
GETACHEW, Lidet
GILES, Autumn
GRAVOSO, Christian
GUERRERO, Athanasia
HANSCH, Ernst
HARMS, Amber
HESSMANN DALAQUA, Giovana
HESTER, Kathleen
JENSEN, Mathew
KAVANAGH, Kyla
KHALIL, Sarah
KOSHOWSKI, Tyler
KOULACK, Silas
LACANILAO, Mary Claire
LAKHI, Suraj
LALJI, Aliza
LANGSTAFF, Martyn
LANTIN, Jonhelyn
LAURIN, Francine
LAVAL, Madison
LEUNG, Meghan
LORANGE, Michael
MACEY, Taylor
MACKAY, Justin
MACRAE, Elizabeth
MARCOUX, Simone
MBAMALI, Chukwudifu
MCDONALD, Brayden
MCFADDEN, Michelle
MCMILLAN, Matthew
MERRY, Jaidan
MICFLIKIER, Joshua
MIKA, David
MOAR, Alexsondra
MOLLOY, Devon
NASH, Victoria
NEIL, Parker
OLADIJI, Abosede
OLFERT, Joel
OLUMOLA-DAVIS, Moyosore
OLUWASANMI, Olutosin
PAPPAS, Elizabeth
PARK, Owen
PARKER, Madison
PATRIARCA, Dan
PEKETÂWASIN, Pamela
PEÑA, Matthew
PENNER, Eric
PHILIPPOT, Alexandra
PODAIMA, Evan
PUROHIT, Ketki
PUSZTAY, Gregory
REMPEL, Emily
ROBILLARD, Scott
SADER, Lucas
SASEK, Owen
SCARAMUZZI, Katrina
SCHIPPER, Daniel
SCRIBNER, Amy
SHAMS, Zaid
SHARPE, Avery
SHEPPARD, Breanna
SILVA, Kulappuwa
SINGH, Gurdeep
SLONOSKY, David
SMITH, Alexa
STADNYK, Steven
STANDIL MARGOVSKI, Jarod
STEFANSON, Jillian
STEWART, Merissa
STONEHAM, Frances
SWAN, Tyler
TAIWO, Funmilayo
TRAMLEY, Erin
TYMKO, Courtney
VANDALE, Jana
WEBER, Andrew
WIEBE, David
WILSON, Nicole
YAKIMCHUK, Trevor

Celebrating Success

*By Alyssa Cloutier**

On June 7, 2022, the Manitoba Bar Association's Women Lawyers' Forum Section (the "WLF") held its tenth annual Celebrating Success event in recognition of the distinguished achievements of women who have been appointed to or are retiring from the Bench. As a result of the COVID-19 pandemic, this was the first time the event was held since 2019, which meant the achievements from each of the last three years were celebrated. While the event looked slightly different this year, it was a resounding success. A total of 65 women gathered to honour and celebrate the achievements of the 17 honourees.

This event is an annual reminder of the efforts of women in law to continue to break down barriers experienced by women in the legal profession, and how the current generation of women judges continue to blaze the trail for the generations that follow.

The 2022 honourees celebrated at the event were Justice Shauna McCarthy, Justice Anne Turner, Associate Chief Judge Tracey Lord, Judge Victoria Cornick, Judge Christina Cheater, Judge Stacy Cawley, Justice Barbara Hamilton, Justice Marilyn Goldberg, Justice Laurie Allen, Judge Christine Harapiak, Judge Cindy Sholdice, Associate Chief Justice Gwen Hatch, Justice L. Kim Antonio, Senior Master Karen Clearwater, Judge Rachel Rusen, Justice Deborah McCawley, and Judge Theresa McDonald. The event provided attendees with a long-awaited opportunity to gather in-person once again and the caliber of professional women in the room was inspiring.



The formal portion of the evening began with a greeting by Justice Diana Cameron on behalf of the Canadian Chapter of the International Association of Women Judges ("CCIAWJ"). Justice Cameron's greetings were followed by the presentation of certificates to each of the honourees. While the honourees did not make speeches as they had in previous years, short biographies of each honouree were projected on a PowerPoint presentation throughout the evening. This provided attendees with the opportunity to gain insight into the highly successful careers that led each of the honourees to their respective roles in the judiciary.

This event is an annual reminder of the efforts of women in law to continue to break down barriers experienced by women in the legal profession, and how the current generation of women judges continue to blaze the trail for the generations that follow. While this year's event celebrated the significant advances that women have made in the legal field and the judiciary, it was not lost on anyone that there is still important work to be done to support women in the legal profession. A recent initiative of the CCIAWJ, in partnership with the Law Society of Manitoba and the Manitoba Bar Association, is a promising example of the work currently being done to encourage and support women in developing long-lasting careers in the legal profession. A virtual roundtable was held in February to discuss the retention and advancement of women in Manitoba's legal profession. A report summarizing the event will be published shortly and a national initiative flowing from regional events like this one is developing.

The WLF's Celebrating Success event, and others like it, provide women in law with an opportunity to commemorate the success of their colleagues. The importance of this cannot be overstated. The WLF looks forward to hosting this event for many years to come as we celebrate the continued triumphs, success, and advancement of women in the legal profession, and continue to encourage women to make strides in the future.

**Alyssa Cloutier is a Member-at-Large of the MBA Women Lawyers' Forum Section and practices with the law firm of Cochrane Saxberg LLP (a predominantly female law firm specializing in Indigenous and child protection law).*

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The Honourable Richard Chartier is retiring this fall as Chief Justice of Manitoba.

There are two special events in honour of this occasion.

Context Matters: Rediscovering the Origins of Manitoba Law

October 27, 2022 | 1:00 p.m. – 4:00 p.m. | RBC Convention Centre

Join the Chief Justice of Manitoba, Richard Chartier and special guest presenter, Professor Aimée Craft, for a fun and interactive exploration of the impact of historical events on the legal system in Manitoba and Canada.

The afternoon will also feature a keynote address by Supreme Court of Canada Justice Nicholas Kasirer.



The Honourable Richard Chartier



The Honourable Nicholas Kasirer



Professor Aimée Craft

Register Now

Visit the Law Society website to register.

Eligibility for CPD Hours:
This program may be reported for up to 3 hours of CPD activity, including 3 hours EPPM.

Retirement Gala for the Chief Justice of Manitoba, Richard Chartier

October 27, 2022 | 5:30 p.m. start | RBC Convention Centre - York Ballroom

Do not miss this special evening with guest speaker The Right Honourable Richard Wagner, P.C., Chief Justice of Canada.

- **Cocktail reception:** 5:30 p.m. – 6:45 p.m.
- **Dinner and formal program:** 7:00 p.m.
- **Dress code:** Business/Cocktail

Reserve Your Seat

Visit the Law Society website to reserve your seat.

What About the Trust: The "Assignment of Security Deposits"...Really?

*By Jason Bryk **

Residential apartments are governed by *The Residential Tenancies Act*.

A residential landlord may, or may not, require a tenant to pay a "security deposit" and being an amount of money to be held as security for the performance of an obligation or a liability of a tenant.

If that security deposit is paid, it must be held by the landlord or landlord's property manager.

In the event the deposit is held by the landlord the property may be self-managed and the deposit shall be held by the landlord in trust for the tenants pursuant to *The Residential Tenancies Act*.

In the event the deposit is held by a third party property manager and being an authorized official (restricted broker) pursuant to *The Real Estate Services Act*, the deposit would also be held in trust but by the property manager, not the landlord, for the tenants in the property manager's own separate trust account payable only in accordance with the "trust" and *The Real Estate Services Act* (in other words payable only to the person entitled and being the person entitled pursuant to *The Residential Tenancies Act*).

When a landlord or property manager desires to make a claim against a deposit, unless the tenant whom the deposit is held in trust for agrees in writing, authorization must be sought from the Director of the Residential Tenancies Commission as to a determination of the claim before the deposit so held in trust is disbursed. In some cases, the Director may release the deposit to the landlord, in others to the tenant, perhaps otherwise, it is for the Director to decide.

From time to time, a landlord may desire to mortgage its residential apartment building upon which a lender will require certain security, in the normal non-recourse course that security is a Mortgage, a General Assignment of Rents and Leases and a General Security Agreement; more times than not, the landlord is the registered owner of the property and the named borrower.

From time to time, a lender will stray from what is the normal course and may require a borrower to provide additional security documents, on occasion that additional security includes an Assignment of Security Deposits whereby the borrower grants a security interest to a lender in all security deposits and interest thereon respecting the property so being mortgaged; the rationale of the lender appears to be that in the event the borrower defaults on the loan, the lender desires to "step into the shoes of the landlord" and manage the apartment building accordingly and, for that matter, manage the security deposits until such time as the debt is satisfied.

If you encounter a lender requiring an Assignment of Security Deposits, proceed with caution.

First, as the deposits are held in trust for the tenants the deposits are the property of "someone else" (tenants) until such time as that "someone else" (the tenant so entitled) or the Director (as authorized by statute) authorizes disbursement. Landlords and property managers cannot simply grant a third party (a lender) a security interest in property (a deposit) they do not own, nor can landlords and property managers simply grant a third party an interest in a deposit (money) held in trust.

Second, in the event the security deposits are indeed held by a property manager, a borrower cannot grant a security interest in someone else's bank account, namely the property manager's bank account, thereby, if the apartment building is managed by a third-party property manager the "correct party" to the Assignment of Security Deposits would be the property manager not the borrower. I have yet to encounter any property manager, willing to sign an Assignment of Security Deposits for the reasons set forward above, namely the property manager cannot grant a third party unrestricted access to its trust account regardless of a borrower defaulting on a loan or otherwise, such action would jeopardize and likely result in revocation of the property manager's license and thereby, jeopardize and perhaps end the entirety of the property manager's business.

Third, if the Assignment of Security Deposits is signed by the borrower regardless of whether or not the security deposits are held by the property manager, or for that matter signed by the property manager, it is arguable the contract created by virtue of the "assignment" is an "illegal contract" (by virtue of granting a third party an interest in money being held in trust for someone else) and is thereby void or voidable.

Fourth, if the borrower is a corporation and the Assignment of Security Deposits is authorized by the directors, the directors have effectively "authorized" an unlawful action, and by virtue of that authorization the requisite corporate authority is absent. A corporation does not have corporate authority to permit itself to enter into unlawful acts.

Fifth, if the borrower is a corporation, the borrower's lawyer will be asked to provide an opinion on the corporation having corporate authority; if a corporation lacks the corporate authority to permit itself to enter into unlawful acts, a corporate borrower's lawyer cannot opine on same.

Sixth, in the event the borrower's lawyer does provide the opinion on the corporation having the corporate authority to enter into an unlawful act, the lender's lawyer will most certainly be providing its own opinion (likely an enforceability opinion), relying on the flawed opinion of the borrower's lawyer and thereby the process of reliance is inherently flawed, as the lender's lawyer would be relying on an improperly given borrower's opinion and by virtue of that reliance providing an opinion stating that a corporation had the corporate authority to commit an unlawful act and, notwithstanding that unlawful act being unlawful, enforceable.

While the writer does appreciate the intent of lenders when an Assignment of Security Deposits is requested, that intent does not make it right and the writer can think of no good reason why an Assignment of Security Deposits should be requested of or

What About the Trust: The "Assignment of Security Deposits"...Really?

cont'd

granted by a borrower or property manager. Even in the event a rogue landlord defaults on its mortgage and absconds with the deposits held in trust, there would most certainly be coverage pursuant to the "Security Deposit Compensation Fund" and the Director would then compensate the tenant whose trust funds (deposit plus interest) were misappropriated from that Fund. Upon compensating the tenants accordingly (at no loss to the lender) the Director would then take action against the rogue landlord who absconded as authorized by *The Residential Tenancies Act*.

A conventional General Assignment of Rents and Leases coupled with a General Security Agreement is adequate; an Assignment of Security Deposits should not be included in a lender's security package, a lender should not suffer a loss without as the Fund should ensure tenants are kept whole. Alternatively, if a lender verily believes the conventional security and Fund to be inadequate and continues to express concern about the deposits potentially being absconded and demands "protection", a lawful comprise would be to:

(i) Require the borrower to remit all deposits to a third party property manager, approved by the lender, to be held by that property manager pursuant to *The Residential Tenancies Act* and *The Real Estate Services Act* (in other words to be held in trust for the tenants);

(ii) Obtain mutual undertakings from each of the borrower and the lender approved property manager, to the lender whereby each of the borrower and property manager undertake not to request or remit the deposits to the borrower without the written consent of the lender; and

(iii) Ensure the mortgage contains a term whereby the property manager must be approved by the lender in writing and a further term whereby the lender has the power to appoint a new property manager at its discretion.

Considering (i), (ii) and (iii), the deposits would be kept by the third-party property manager who would not want to risk jeopardizing its license and business by absconding with the deposits, that property manager should also have insurance to protect itself from a rogue employee absconding with trust money; the undertaking would ensure the deposits would not be transferred by the property manager to the borrower and thereby, would remain in trust with the property manager; in the event of a default of the mortgage the lender pursuant to its power (if desired) could appoint a new property manager and in such event could then have the deposits lawfully administered by virtue of the lender holding, owning or administering the real property pursuant to its power under the mortgage. All that said, the aforementioned compromise will certainly cause delay and I question why a lender, who is concerned that a landlord could abscond with the deposits (usually equal to approximately half of one months total rent) would be otherwise content with allowing the landlord to collect the rents each and every month (a monthly amount equal to approximately double the amount of the deposits).

If you act for a lender, please do not include an Assignment of Security Deposits as part of your client's security package; if you act for a borrower the Assignment of Security Deposits should not be "authorized" by resolution, nor should it be signed unless the written authorization of the tenants or the Director is obtained (certainly an impossible feat); as a lawyer for either a lender or borrower please ensure the actions you are opining upon are indeed lawful, authorized, within the scope of corporate authority and thereby enforceable.

**Jason M.J. Bryk is the Chair of the MBA Real Property Section and a Partner with Pitblado LLP, a MBA Partner Firm.*

MBA Summer Student



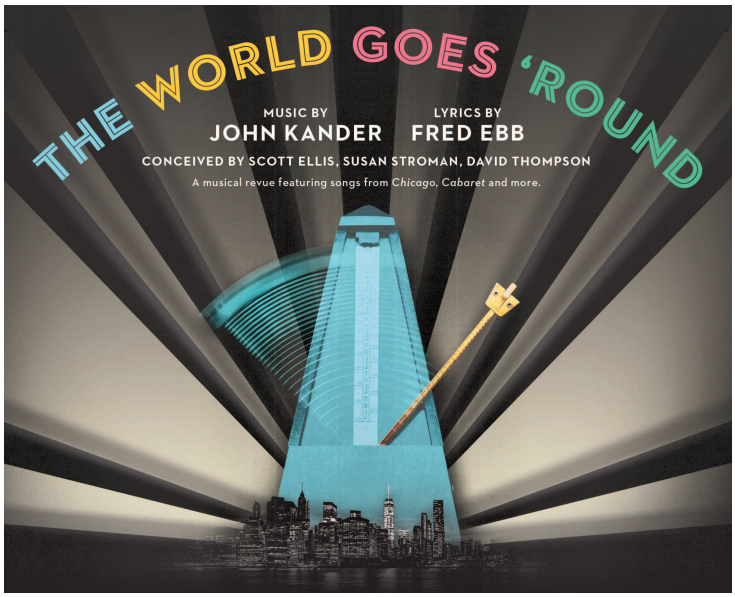
My name is Audrey Bews and I am excited to be able to work with the Manitoba Bar Association for a second summer. As the Manitoba Bar Association's Summer Student, I will be working on updating the 2023 Legal Directory & Day Planner.

I have just completed my second year as a law student at the University of Manitoba. I am looking forward to finishing up my final year at Robson Hall this fall and then embarking on my articling journey. Prior to my studies at Robson Hall, I completed a Bachelor of Art Honours degree in History at the University of Winnipeg. I spent numerous years studying Canadian social history which led to my desire to pursue an education in law.

I look forward to interacting with many of you this summer to verify your contact information. Please do not hesitate to get in touch with me regarding all things related to the Legal Directory.

All the best, Audrey Bews.

Once again, we have reason to celebrate a fantastic partnership that has evolved between the Manitoba Bar Association (MBA) and the Royal Manitoba Theatre Centre (RMTC). Each year, a cast made up entirely of volunteer lawyers, law students, judges, and other members of the legal community devote their time and energy to put their dramatic skills on display in a spectacular show.



This year's production, *The World Goes 'Round* was the 29th co-production between the RMTC and the MBA.

Auditions for this production were held in November 2021, and shortly thereafter the selected cast started to prepare for the scheduled opening on May 10, 2022.

Although I am seriously underqualified to provide a reputable review of theatre, I can say that the performance was highly entertaining. Each actor had their moment to shine and put on energetic and fantastic performances.

On behalf of the MBA, I would like to thank the cast and crew for their tremendous contribution toward the success of this partnership. It is because of your incredible volunteer efforts that we can raise funds for the RMTC and showcase one of the ways the legal profession gives back to the community. To date, the MBA has raised over $1.1 million dollars for the Royal MTC.

I would also like to thank the Director, Danny Carroll, the Stage Manager, Chuck McEwen, the staff of the RMTC, the Lawyers Play Committee members, and the featuring sponsors, 300 Main, Lawton Partners, U of M Faculty of Law, and Jones & Company. Without the support and efforts of all these people, the show may not have gone on.

Finally, thanks to all of those who attended for their support both the MBA and the RMTC.

Tanya Keller
President, Manitoba Bar Association



THE CAST:

Kathrine Basarab
Jennifer Bird
Jessica Cogan
Paul Cooper
Phillip Cramer
Tashia Dreger
Alicia Dueck-Read
Caleigh Glawson
Benji Greenberg
Deanna Hiebert
Zilla Jones
Ashley Kaufmann
David Kroft
Melanie Labossiere
Joel Lebois
Catherine Litinsky
Hayley Main
Leo Palay
Sandi Phillips
Jodi Plenert
Nalini Reddy
Jaime Rosin
Darcia Senft

*By Laurelle Harris**

Equality Issues Section - A Living Legacy

In June 2022, our profession was diminished with the retirement of Ms Jacqueline St. Hill, Q.C. Every time a member of our profession retires, we are left as a profession with less knowledge, less experience, and less wisdom, but in the case of Ms St. Hill's retirement, the impact on our profession is one of which few may be aware.

Ms St. Hill ("Jacquie" as friends and close colleagues refer to her) was called to the Bar in 1985 and spent her entire career working in public prosecutions; when she retired, she did so as the Director of Prosecutions (Intake) for Manitoba Justice, a position she held for many years. As the most senior Black woman practicing law in Manitoba at the time of her retirement, Jacquie's professionalism, success, and the respect she garnered from others in the profession have inspired me and other women to enter this profession - and remain.

Last year, Jacquie was honoured by the Canadian Bar Association, who presented her with the Cecilia I. Johnstone Award, a national award intended to recognize lawyers who have advanced and supported women in law. This honour could not have been awarded to someone more deserving. The importance of Jacquie's support and mentorship to students and lawyers of all genders, folks who too frequently experience barriers within and outside the profession, cannot be overstated.

On June 29, 2022, the MBA held its first mixer for Indigenous and racialized lawyers as well as all lawyers who support equity in the profession. Over forty people, many of them young Indigenous and racialized lawyers and students, were in attendance. As a member of the Equality Issues Section Executive, Jacquie spoke from the heart about the many wonderful aspects of her career, but she also spoke of the reality she faced as a Black woman – she also had to *survive* aspects of it. Her fervent wish was that Indigenous and racialized lawyers will be able to thrive within the profession, not just survive it. She inspired all of those in attendance with her optimism for the future, her realism about current challenges in our profession, and shared her wisdom gained over the course of her 37-year career. The impact of her words, especially for the most junior members of our profession, was demonstrably welcome and needed – as it was for more senior members of the profession.

Jacquie was never a lawyer who sought the spotlight. She moves quietly through the world, lending her assistance to organizations and individuals in need. Never flashy, never one to engage in self-promotion, many of her contributions to our profession are unknown, but nevertheless very impactful.

I graduated from law school in 2001; at the time, I was one of only two Black women attending law school at the University of Manitoba. Once I entered practice, there were very few Black women practicing law in Manitoba – three or four at most. Jacquie was one of those women who blazed a trail for other Black and racialized women entering the practice of law in Manitoba. Even before I met Jacquie for the first time, I knew of her, and her presence as a successful lawyer who was also a Black woman gave me hope that I would be able to excel in the profession as well.

The importance to other Black women to see Black women lawyers represented in the profession cannot be understated. It is difficult to dream when those dreams appear impossible; it is equally difficult to navigate difficulties that racialized lawyers face in our profession without a map or a compass.

Jacquie's support earlier in my career was instrumental to my ability to remain in this profession where so many other women, and racialized women in particular, are unable to thrive due to the effects of systemic (and gendered) racism. Although we did not practice in the same area, Jacquie nevertheless gave me sound advice upon which I have relied many times over the years in the face of the oppressions I have experienced.

As she did with me, Jacquie personally mentored and lent support to many people who ultimately became lawyers, especially racialized women and men, even prior to their attendance at law school. When called upon, Jacquie rarely declined to act; always doing so with dedication and humility. Her commitment to uplifting others is genuine and heartfelt; she inspires and causes others to nurture their own aspirations.

Jacquie may have retired, but she is far too dedicated to the wellbeing of others to disappear entirely. She says that she will be "around" and intends to remain an active member of the MBA. Lucky for us. The task before each of us, now, is to emulate what Jacquie has done for others so that all our profession becomes truly open to all and we can all truly thrive within it.

Congratulations on your retirement from a historic career, Jacquie, and thank you for all you have done to support those folks who have needed it the most in this profession. We are here, in large measure, because you were.

** Laurelle Harris is with Harris Law Solutions and is Chair of the MBA Equality Issues Section.*

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The Robson Report

RESEARCH REPORT ***by Dr. Donn Short***

Katie Szilagyi presented "Consuming the Metaverse: Science Fiction Origins & Digital Data Economies", co-authored with Christina Fawcett, at Consuming Justice: Law, Crime, Justice and Consumption /11th Critical Perspectives Conference, hosted by the Centre for Interdisciplinary Justice Studies at the University of Winnipeg in May 2022.

Martine Dennie presented "*Tying Tort to Professional Sport: Culture, Common Law, and the Reasonable Hockey Player*" at the Canadian Law of Obligations conference at the University of British Columbia on June 24, 2022.

On June 23, 2022, **Dr. Jennifer L. Schulz** was an invited speaker at the Canadian Law of Obligations Conference at UBC on the topic of mediator liability. On July 14, 2022 she presented virtually at the Global Law & Society Association Conference in Lisbon.

Dr. Melanie Murchison, Dean **Richard Jochelson,** Professor **David Ireland,** 3L Student **Tan Ciyilepe,** and alumnus **Silas Koulack**, recently published "*Remote Learning in Law School During the Pandemic: A Canadian Survey*" (2022) 8(1) Canadian Journal of Comparative and Contemporary Law - available at: https://www.cjccl.ca/wp-content/uploads/2022/7-Murchison-et-al.pdf.

Dr. Gerard Kennedy recently published, "The Rules-Standards Debate and Ontario Civil Procedure Reform: A Case For More Rules?" in the *Journal of Legal Philosophy*; and "Glover Progressive Conservative Party of Manitoba*:* Courts Deferential in Reviewing Internal Party Affairs – Even When They're 'Contracts" in the *Journal of Parliamentary and Political Law.*

Dr. Kjell Anderson was a successful co-applicant for a $2.5 million SSHRC Partnership Grant for the Visual Storytelling and Graphic Art in Genocide and Human Rights Education project. The project brings together survivors of mass atrocities with artists to create graphic novels highlighting their experience of genocide and other human rights violations. These graphic novels - on The Holocaust, Rwanda, Bosnia, Kosovo, Iraq, Syria, and Canada - will then be used for a range of educational activities. Dr. Anderson was also awarded a $250,000 SSHRC New Frontiers in Research grant (as a co-applicant) for the project "A Long Walk: Repatriation, Decolonization, and Reconciliation". This Indigenous community-led project involves establishing a University of Manitoba process for the repatriation of ancestor's remains as a practice of reconciliation.

On June 10 to 12, 2022, Associate Professor **Bruce Curran** attended a workshop led by the Centre for Law in the Contemporary Workplace and the Employment Relations Program, both of Queen's University, where he presented a paper on the implications of outsourcing and offshoring for work in Canada. This paper will form a part of an edited collection published by University of Toronto Press.

ROBSON HALL ACTIVITIES ***by Trina McFadyen***

ARTICLING POSITIONS NEEDED

There are five (5) Robson Hall graduates still seeking a Manitoba articling position for 2022-23. Please contact Trina McFadyen (trina.mcfadyen@umanitoba.ca) if you are interested in hiring an articling student to start immediately.

2023-24 WINNIPEG ARTICLING RECRUIT

Thank you to all the legal employers who participated in the 2023-24 Winnipeg Articling Recruit! 46 Robson Hall students secured an articling position in the Recruit. Approximately 64 students are still seeking articles for 2023-24 though a portion of those students will participate in upcoming out-of-province recruits.

CONVOCATION

The Convocation ceremony for Faculty of Law J.D. graduates was held in-person on June 8, 2022. Following the ceremony, Robson Hall hosted a reception in the Common Room for students, their families, and friends. It was a wonderful opportunity to have the Class of 2022 together in the school for the first time since March 2020! This year's Gold Medalist for Law was **Celyna Yu** and the Class Valedictorian was **Rowan Greger**. The Faculty of Law is incredibly proud of the 97 Juris Doctor, one Master of Laws, and 11 Master of Human Rights students who graduated this year and wish them all the best in their future careers!

HONOURARY DEGREES FOR FORMER LAW DEANS

Former Dean **David Asper, Q.C.** received an Honorary Doctorate on June 8, 2022 and accepted an Honorary Doctorate on behalf of his friend and former client, the late David Milgaard. Later that afternoon, former Dean **Harvey Secter, O.C., O.M.** also received an Honorary Doctorate. Robson Hall congratulates our former Deans on this honour!

EMERGING LEADERS

Three law students received the University of Manitoba's 2022 Emerging Leader Award. These remarkable students include Class of 2022's **Michael Badejo** and **Shawn Singh**, as well as soon-to-be 3L student **Adam Kowal**. Congratulations to all three worthy recipients!

The Robson Report

INDIGENOUS AWARDS OF EXCELLENCE

Each year, members of the UM Indigenous community are recognized for making the University a more inclusive and supportive learning environment. Congratulations to staff member **Marc Kruse** on being awarded the UM's Staff and Faculty Trailblazer Award and to student **Adam Kowal** on receiving the Student Community Builder Award!

RETURN TO SCHOOL

The Faculty of Law will welcome first-year law students to Orientation starting September 6, 2022 with classes beginning in-person (fingers crossed) September 7, 2022. We are excited to welcome all students with a newly Indigenized curriculum, new clinical opportunities and new professors and instructors including **Dr. Daniel Diamond, Dr. Leo Baskatawang, Dr. Rebecca Jaremko Bromwich,** and **Liz McCandless**. We also welcome the new Mauro Chair in Human Rights and Social Justice, **Dr. Nathan Derejko**.

EXTERNSHIPS

Did you know that Robson Hall will be offering six externships in 2022-23? They are:

1. Legal Help Centre Externship
2. University of Manitoba Community Law Centre (UMCLC) Criminal Law Externship
3. Manitoba Law Reform Commission Externship
4. L. Kerry Vickar Business Law Clinic Externship
5. Cochrane Saxberg Indigenous Community Clinic Externship
6. RobsonCrim AG Externship

HOMECOMING 2022 – SAVE THE DATE

Homecoming 2022 will be held virtually on Wednesday, September 21, 2022 at 5:00pm CST. We will be celebrating the 50th anniversary of the UM Community Legal Centre (UMCLC) being part of Legal Aid. If you have a story to share about your time volunteering for the Centre while at Robson Hall, please contact Christine Mazur (Christine.mazur@umanitoba.ca) – we would love to hear from you!

** Dr. Donn Short is a Professor and Associate Dean of Research & Graduate Studies at the Faculty of Law. Trina McFadyen, LL.B. is the Faculty of Law's Director of Professional Development.*

CLASSIFIEDS/ANNONCES

LOST WILLS

Anyone having knowledge of a Last Will and Testament of **AMBROSE ASSIN**, late of Winnipeg, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **JIM BRENNER**, late of Ashern, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **PAULETTE MARIE BREWER**, late of Winnipeg, Manitoba, please contact Brenda Knight, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **FAYE CHRISTINE CANNON**, late of Winnipeg, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **RUDY CASAR, also known as RUDOLF CASAR**, late of Winnipeg, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **AUDREY DAVIS**, late of Winnipeg, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **DORIAN ANTHONY DENNY**, late of Winnipeg, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **KENNETH WAYNE DEREN**, late of Winnipeg, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **ALEXANDRA GOODMAN**, late of Winnipeg, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **HARRIETTE GUIBOCHE**, late of Whitemouth, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Classifieds continued on Page 27.

Administrative Law Decision

*By John Isfeld**

***Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29**

Judgment Rendered: July 8, 2022
Reasons for Judgment by: Rowe J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Martin, Kasirer and Jamal JJ. concurring)
Dissenting: Côté J.
For the Appellant: Caza Saikaley
For the Respondent: McDougall Gauley
Various counsel made submissions on behalf of interveners

Facts: In 2012, the Law Society of Saskatchewan brought disciplinary proceedings against one of its member lawyers for several financial transaction in which the member had issued cheques to clients, only to have them endorsed by the client, and finally cashed by himself. This included one apparent client who was fictitious, the Law Society finding that the member had endorsed the cheques in question under a false name. The proceedings were not resolved until 2018, when the member was found guilty of four charges of conduct unbecoming a lawyer. In 2019, the member was disbarred without a right to apply for readmission for just under two years. During the proceedings, the Hearing Committee of the Law Society dismissed the member's application for a stay of proceedings on the basis of inordinate delay amounting to an abuse of process. The Court of Appeal granted the member's appeal of the stay application, concluding that there had been inordinate delay which resulted in significant prejudice to the member such that the public's sense of decency and fairness would be affected, and the Law Society's disciplinary process brought into disrepute. The Law Society appealed this finding to the Supreme Court of Canada.

Issues: Did the Court of Appeal erred in finding that there was inordinate delay which resulted in significant prejudice to the member?

Conclusion: The appeal should be allowed, the judgment of the Court of Appeal set aside, and the matter remitted to the Court of Appeal to address outstanding grounds of appeal.

Analysis (Rowe, J):

Standard of Review

The majority stated that as a statutory appeal under *The Legal Profession Act*, 1990, the standard of review in this case will follow the appellate standards: correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law. The majority cited the case of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and stated that while the rule set out in that case referred to matters of substantive review, the same principal applies in cases of procedural fairness.

The majority highlighted that abuse of process in the administrative context is a matter of procedural fairness and held that whether there has been an abuse of process is a question of law, and thus in this case, is reviewable on the correctness standard. However, the majority throughout its decision referred to findings of fact and fixed fact and law of the Hearing Committee which were overturned by the Court of Appeal, indicating that such findings should have been reviewed on the standard of a palpable and overriding error.

The Law

The majority stated that delay may constitute an abuse of process in two ways: (1) the fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them, or, (2) even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay.

The majority relied on *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 in setting out a three-step test to determine whether delay has engaged the second ground of significant prejudice. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. Once the first two steps have been met, the court may assess whether the delay amounts to an abuse of process.

Whether delay is inordinate is determined by an assessment of the context overall, including non-exhaustive factors such as the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case. The majority stated that professional disciplinary proceedings must be dealt with in a timely manner, as they affect the livelihood and reputation of the member, involve complainants who benefit from having their case proceed promptly so that they can be heard and move on, and serve a function to protect the public from harmful professional misconduct. The majority went on to state that a lengthy delay is not per se inordinate, but may be justified in cases where, for example, there are parallel criminal proceedings. The majority highlighted that a court should also consider whether the applicant contributed to the delay, stating that where a party causes a delay, they cannot complain of that delay as an abuse of process. Finally, the majority stated that delay may be justified in complex proceedings but may not be in a routine case dealing with issues in which the tribunal has experience.

The majority then highlighted that the second requirement, significant prejudice, is grounded in the foundations of the doctrine of abuse of process in administrative law, citing *Blencoe* to say that if delay alone was sufficient to lead to an abuse of process, it would be "tantamount to imposing a judicially created limitation period". The majority stated that Prejudice is a question of fact, and cited several examples, including significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention.

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Administrative Law Decision

Regarding whether the delay amounts to an abuse of process, the majority stated that delay will be an abuse of process if it is manifestly unfair to a party or brings the administration of justice into disrepute.

The majority warned that a stay of proceedings is the ultimate remedy for abuse of process and should only be granted in the clearest of cases, when the abuse falls at the high end of the spectrum of seriousness. The majority highlighted that in disciplinary proceedings, a stay means that charges will not be dealt with, the complaint will go unheard, and the public will not be protected. There are thus competing public interests at stake in the case of an abuse of process: the public interest in a fair administrative process untainted by abuse and the public interest in having the complaint decided on its merits. When faced with a proceeding that has resulted in abuse, the court must ask itself whether going ahead with the proceeding would result in more harm to the public interest than halting the proceeding. If the answer is yes, then a stay of proceeding should be ordered. If the answer is no, the application for a stay should be dismissed. The majority highlighted that where there has been an abuse of process, the court should also consider whether other remedies for the abuse of process, such as compensation for the aggrieved individual, a reduction in sanction, or an award of costs, would adequately protect the public's interest in the proper administration of justice.

Application

The majority stated that the Court of Appeal did not err in identifying the applicable standard of review, but failed to apply it properly. The Hearing Committee concluded that there was no inordinate delay and no significant prejudice to the member. The majority held that the Court of Appeal improperly substituted its own findings on these points. The majority concluded that while the actions of the Law Society were not above reproach, none of the requirements of the three-step test for abuse of process were met.

Dissent (Côté J.):

Standard of Review

The dissent disagreed with the majority's reliance on *Vavilov* for the proposition that appellate standards of review applied in the present case, stating that the Court's jurisprudence is clear: the question of whether an administrative decision maker has complied with its duty of fairness is subject to the standard of correctness, regardless of the existence of an appeal mechanism. The dissent argued that because *Vavilov* excluded procedural fairness review from its purview, it does not suffice to oust this well-established principal. The dissent went on to state that inordinate delay constitutes an abuse of process on its own and is thus subject to the correctness standard.

Law/Analysis

The dissent argued that the delay in these proceedings amounted to an abuse of process, stating that the Court of Appeal correctly sanctioned this abuse of process by ordering that the penalty for professional misconduct, but not the convictions themselves, be set aside. The dissent also disagreed with the majority's framing of the legal principles governing the assessment of inordinate delay in administrative proceedings.

The dissent cited *Blencoe* to state that inordinate delay on its own is a breach of procedural fairness and thus abusive, and that the requirement for significant prejudice only applies where a stay of proceedings is sought. The dissent stated that inordinate delay risks bringing the administration of justice into disrepute, and thus must always be sanctioned. The dissent warns that the three-step test set out by the majority is so onerous that it invites complacency in administrative proceedings, and added that although prejudice is not necessary for a finding of inordinate delay, it remains highly significant in determining the appropriate remedy.

The dissent stated that there must be a clear distinction between the threshold for a finding of abusive conduct and the threshold for a stay of proceedings, highlighting that for a court to award a stay of proceedings: (1) there must be prejudice to the fairness of the trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; (2) there must be no alternative remedy capable of redressing the prejudice; and (3) where it is unclear whether a stay is warranted after the first two steps, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

**John Isfeld is the Chair of the MBA Administrative Law Section and an associate with Boudreau Law.*

Civil Litigation Decision

*By Bret Lercher**

***People Corporation v. Mansbridge*, 2022 MBCA 37**
Judgment: April 25, 2022
Decision by: Monnin JA
On appeal from: 2021 MBQB 170
For the (Plaintiff) Appellant: S. C. Bieber and V. C. Wicks
For the (Defendant) Respondent, Mansbridge: L. K. Troup and N. A. M. Copps
For the (Defendant) Respondent, HUB International Limited: J. A. Baigrie

This decision results from an appeal of a motion for an interim injunction to enforce restrictive covenants against Mr. Mansbridge and his current employer. This decision confirms in Manitoba the higher threshold test that must be met when seeking enforcement of restrictive covenants against a former employee, and emphasizes the scrutiny that Canadian courts apply when analyzing these kind of restrictive covenants.

Facts

In the Queen's Bench decision appealed by the appellant, the Court declined to issue an interim injunction against the appellant's former employee ("Mansbridge") and his new employer ("HUB").

The appellant is a corporation that provides health benefits and a variety of human resources products to both groups and individuals. Mansbridge was formerly a benefit consultant and salesperson with the appellant, starting employment with the appellant in 2011. By the time his employment with the appellant ended, he was responsible for servicing around 100 clients and generating 1.8 million dollars in annual revenue.

Mansbridge's employment with the appellant was governed by a written employment agreement, which contained three post-employment covenants: a confidentiality clause, a non-solicitation clause, and a non-competition clause. Both the non-competition and non-solicitiation clauses were to remain in effect for a period of 18 months after the end of Mansbridge's employment.

In February 2021, Mansbridge gave notice to the appellant of his resignation, effective for April. Upon receipt, the appellant ended Mansbridge's employment immediately, and Mansbridge commenced employment with HUB in April 2021 as a benefits consultant. Approximately nine of the clients he serviced while employed with the appellant sought services from HUB after Mansbridge was on board.

After Mansbridge departed for HUB and the appellant lost those clients, they filed a Statement of Claim against the defendants and sought an interim injunction to prevent Mansbridge from:

(a) Soliciting or accepting business (directly or indirectly) from the appellant's current or prospective clients; and

(b) Using the appellant's confidential information.

In support of its injunction motion, the appellant brought evidence that several clients of the appellant were contacted by Mansbridge, and that in 2018, Mansbridge sent some confidential information of the appellant, including client lists, to his personal email address.

While the appellant was awarded a temporary injunction, on the contested motion the judge determined that the evidence did not satisfy any part of the test for awarding interim injunctions as set out by the Supreme Court of Canada in the seminal case of *RJR-MacDonald v. Canada*, [1994] 1 SCR 311 ("*RJR-MacDonald*").

In reaching this determination, the motion judge found that when assessing the enforceability of restrictive covenants in an employment law context, there must be a strong *prima facie* case to grant an injunction, as opposed to the lesser standard of "a serious issue to be tried". While other jurisdictions have long accepted the higher standard for the first part of the *RJR-MacDonald* test, it was not settled law in Manitoba. When assessing the enforceability of the restrictive covenants against this standard, the motion judge determined that none of the post-employment covenants were *prima facie* enforceable as they were overly broad and ambiguous.

Significantly, the motion judge also found that all of the appellant's evidence of solicitation was hearsay, instead accepting Mansbridge's evidence that he did not solicit any of the appellant's customers upon moving over to HUB.

Going through the other two parts of the test from *RJR-MacDonald*, the motion judge found that the appellant had suffered no irreparable harm and that the balance of convenience weighed in favour of Mansbridge. Accordingly, the judge dismissed the motion for injunctive relief.

Conclusion

The Manitoba Court of Appeal dismissed the appeal, affording significant deference to the motion judge's decision to not grant injunctive relief and finding their decision to be correct at law and reasonable in its application of the legal tests. It also confirmed at an appellate level in Manitoba that the higher threshold of a strong *prima facie* case should be applied when deciding upon the enforceability of a restrictive covenant in an employment context.

Analysis

First ruling on the standard of review, the Court of Appeal stated that when reviewing a decision to grant injunctive relief, the nature of the relief is equitable and highly discretionary. Therefore, reviewing courts are to treat those decisions with a high degree of deference.

The first ground of appeal argued that the motion judge incorrectly adopted the "strong *prima facie* case" threshold instead of the standard "serious issue to be tried". Acknowledging that this was the first time this issue was squarely before the Court of Appeal, it rejected the

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Civil Litigation Decision

appellant's argument. Relying upon the well-recognized power imbalance between employer and employee, and the presumption of restrictive covenants being unenforceable in employment relationships, the Court of Appeal found that it was appropriate for the higher standard on the first part of the *RJR-MacDonald* test to be used when analyzing restrictive covenants in an employment law context. It also noted that this threshold has been adopted at the appellate level in both Alberta and Saskatchewan.

The second ground argued by the appellant was that the motion judge usurped the role of the trial judge in assessing the enforceability of the restrictive covenants prematurely. The Court of Appeal rejected this argument as well, finding that as part of determining if the appellant had a strong *prima facie* case to legally hold Mansbridge to the terms of the restrictive covenants, it was necessary to analyze the covenants themselves and assess their enforceability. While the Court of Appeal did critique how this analysis was set out in the motion decision, they ultimately did not find it to be a reviewable error in law.

The appellant also challenged the motion judge's findings on irreparable harm and the balance of convenience. As both of these findings were largely evidentiary, the Court of Appeal was not willing to interfere with the motion judge's ruling and rejected these grounds of appeal as well.

Ultimately, the Court of Appeal dismissed the appeal and ordered costs in favour of Mansbridge and HUB.

** Bret Lercher is an Associate with MLT Aikins LLP, a MBA Partner Firm.*

CLASSIFIEDS/ANNONCES *cont'd*

Anyone having knowledge of a Last Will and Testament of **JOHN "OZZIE" HARCUS**, late of Fisher Branch, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **LEONARD LEO HATHER**, late of Winnipeg, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **MARCEL HEBERT**, late of Winnipeg, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **ISTVAN HORVATH**, late of Winnipeg, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **BERTHA KEMATCH**, late of Winnipeg, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **EVELYN LINKLATER**, late of Nelson House, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **LORETTA JOY NIKOLAI**, late of Winnipeg, Manitoba, please contact Brenda Knight, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **LAURA MARIE EMILIENNE OLLIVIER**, late of Notre Dame de Lourdes, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **ETHEL SARAH OVERLAND**, late of Flin Flon, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **MARGARET "JOAN" POD**, late of Winnipeg, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **JUDITH RATCLIFFE**, late of Winnipeg, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **TERRY REMUS**, late of Winnipeg, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **MARY ROSENTHAL**, late of Winnipeg, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **SHARON ANNE SINCLAIR**, late of Winnipeg, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **JUNICE ALDA ANNE TAYLOR**, late of Selkirk, Manitoba, please contact Amanda Adam, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **ALLAN LEON TERLECKI**, late of Winnipeg, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **BODO GERHARDT VORMENG**, late of Selkirk, Manitoba, please contact Justin Laurin, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Anyone having knowledge of a Last Will and Testament of **JULIAN ZALUSKY**, late of Selkirk, Manitoba, please contact Courtney Scott, Office of The Public Guardian and Trustee, 155 Carlton Street, Suite 500, Winnipeg, Manitoba R3C 5R9. Telephone: (204) 945-2700.

Criminal Decision

*By Kathrine Basarab**

***R v. McLean,* 2022 MBCA 60**
Manitoba Court of Appeal
Monnin, Mainella, and Simonsen JJA
June 30, 2022

The accused was convicted of two counts of possession for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. He was sentenced to 12 years' incarceration for one count, and six years' concurrent incarceration for the other. He appealed both conviction and sentence. The conviction appeal was dismissed. The sentence appeal was allowed. The sentence for the fentanyl offence was varied to nine years' incarceration. This case is a must-read for anyone prosecuting or defencing fentanyl trafficking cases, or dealing with the issue of when a trier of fact can draw an adverse inference.

Facts: In the course of investigating a local drug network, police identified the accused as a suspected courier for AM, a Vancouver-based drug trafficker. Air travel and financial records established that although he was on social assistance, the accused frequently traveled between Vancouver and Winnipeg. All of his trips were booked last minute, with one-way tickets paid for in cash or by pre-paid credit card. Each trip was for 24 hours or less. Despite the short trips, he always paid extra to check his bag. Police obtained a general warrant to covertly search his bag the next time he traveled to Winnipeg. When he did, police executed the warrant and found 220 grams of fentanyl and 981 grams of cocaine in his luggage. They waited for him to collect his bag from the luggage carousel, and arrested him accordingly.

At Trial: The accused unsuccessfully applied to exclude the drug evidence. Thereafter, the main issue was whether he had the requisite knowledge to be in possession of the drugs. As noted by the court, "the true purpose of the accused's trip to Winnipeg… was a hotly contested fact…" (para. 29).

The Crown's evidence included unchallenged expert evidence that the accused's travel to Winnipeg had several classic hallmarks of a drug courier. The accused's position was that the drugs were placed in his bag in Vancouver without his permission, and that he unwittingly transported them to Winnipeg. Specifically, he testified that he worked for AM as a traveling musical engineer, and that he had been directed by his employer to travel to Winnipeg to work as a DJ and to write some music for an artist. He claimed he had briefly left his suitcase unattended at AM's Vancouver studio whilst having breakfast with his employer prior to flying to Winnipeg, and that he had no idea there were drugs in his bag or who placed them there. Although his flight arrived late in the evening, he was to head to the music artist's studio immediately, even though he did not know the artist's name or contact information.

The trial judge rejected the accused's version of events, finding that his credibility was undermined in three significant ways:

- the significant inconsistencies between his evidence and his post-arrest statement to police;
- the questionable financial logistics of his traveling musical engineer business (note – one of the post-arrest statements to police by the accused was that he himself did not understand why he kept getting hired because he "sucked" as a musical engineer); and
- the absence of any confirmatory evidence that he ever did any musical work of any kind in Winnipeg.

Issue:

(1) Was the search unlawful?
(2) Was the trial judge's credibility assessment flawed?

The Search: The accused challenged the facial validity of the information to obtain the warrant. Briefly, the Court found no fault with the trial judge's approach, concluding that the correct legal principles were applied. The trial judge "properly took a practical, non-technical and common-sense approach as to whether there was any basis upon which the issuing judge could be satisfied that the relevant statutory preconditions to issue the general warrant existed." (para. 19).

Credibility - Hearsay: During *voir dire*, AM's travel records, testified to by a police officer, established that he was in Winnipeg at the same time as the accused, albeit on occasions prior to the date when the drugs were found. This was relevant because the accused's position was that he had no idea that his employer was ever in Winnipeg at the same time he was. Trial counsel did not argue the admissibility of AM's travel records, but rather, the weight, if any, they should be given. On appeal, the accused asserted that this evidence was inadmissible hearsay because it was not called separately on the trial proper. The Court dismissed this argument, citing the agreement at the start of trial that the admissible evidence taken on *voir dire* would apply *mutatis mutandis* to the trial, the fact that there was a considered admission to this evidence at the trial, and that reasonable tactical choices made by competent defence counsel will not be second-guessed.

cont'd

Criminal Decision

Credibility - Adverse Inference: Although the accused testified that there was confirmatory evidence of his "musical work" on his phone, computer etc., he did not tender evidence from these devices. Similarly, he testified that information about the artists he had worked for was "available on the internet", but none was tendered at trial, not even to establish that the artists exist or that performances he said he had worked at ever occurred. The trial judge drew an adverse inference against him on this basis, noting that it would have been simple for him to produce such confirmatory evidence. On appeal, the accused asserted that the burden of proof improperly shifted to him to prove his innocence.

At paragraph 45, the Court listed the conditions that must be present to enable a trier of fact to draw an adverse inference:

(1) An adverse inference cannot be drawn as punishment for a party exercising their legal right not to call evidence, even when there is a wholly unjustified explanation for the decision.

(2) Because of the dangers of drawing an adverse inference, such as potentially reversing the burden of proof, the discretion to draw an adverse inference should be exercised with great caution and mindful of the division of responsibilities between the Crown and defence.

(3) An adverse inference can only be drawn when there is not a plausible explanation for the non-production of the evidence.

(4) The missing evidence must be relevant to a material issue. An adverse inference cannot be drawn as a result of matters unimportant to deciding the case or when there is already some evidence on the relevant point (even if it is of inferior quality).

In this case, the Court was satisfied that the pre-conditions required to draw an adverse inference existed, and that the trial judge proceeded with due caution when making the inference in the context of a credibility assessment of the accused's evidence. At the same time, the Court noted that such inferences "are an exception rather than the rule..." (para. 41, citing *R v. RMK*, 2016 MBCA 63 at para 33). Here, the missing evidence was highly relevant to the accused's "blind courier" defence, and crucial to his claim that someone had tampered with his luggage. No explanation of any kind was provided to explain the non-production of material. The finding that confirmatory evidence should have been "readily available" was reasonable to make in the circumstances.

Sentencing: The Court of Appeal had yet to provide quantitative guidance with respect to appropriate ranges of sentence for fentanyl trafficking. Until now. "The range of sentence for someone minimally involved in mid-level fentanyl trafficking, such as a courier or custodian without some decision-making authority or responsibility in the trafficking activity, six to eight years' imprisonment..." (para. 118). The Court's decision was informed by the Supreme Court of Canada's decision in *R v. Parranto*, 2021 SCC 46, released after the accused was sentenced but before the hearing of his appeal. In *Parranto*, the majority decision surveyed a number of sentencing decisions from across the country, and noted a national range between eight and 15 years' incarceration has arisen in cases of commercial fentanyl trafficking. In Manitoba, these cases would be considered mid-level, or beginning of high-level trafficking operations (para 111, citing *Parranto*, supra, at paras 68, 78).

Having established a range of sentence, and after comparing sentences for similar offences committed in similar circumstances, the Court held that four years beyond the top end of the range was unduly long in the circumstances of this accused. Citing the "no-free-ride" principle, which ensures proportionality of concurrently imposed sentences, the Court departed slightly from the top end of the six to eight range, and brought the sentence for the fentanyl offence down to nine years. The rest of the sentence remained unchanged.

Bottom Line: Fentanyl is a particularly dangerous drug. The Court has acknowledged this by setting a range of sentence that is reflective of this dangerousness. Indeed, the range of sentence here is higher than that for comparable trafficking of cocaine (see *R v. Rocha*, 2009 MBCA 26 at para. 64). This decision affirms that absent some obvious reason that mitigates moral culpability, mid to high-level traffickers can expect to receive very lengthy penitentiary sentences.

** Kathrine Basarab is a Crown Attorney with the Manitoba Prosecution Service and a Member-at-Large of the Criminal Justice Section of the Manitoba Bar Association. Any opinions expressed in this article are solely those of the author and are not representative of the Government of Manitoba or any of its departments.*

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Estates and Trusts Decision

*Tradition Law LLP, Estates & Trusts**

***Re Estate of Marjorie Doreen Pelletier; Ratt v. Pelletier et al.,* 2022 MBQB 123**
Manitoba Court of Queen's Bench Chartier J.
Decision delivered: June 9, 2022
Chad M. Penner for the applicant Kim Ratt
Jonathan Mark Pelletier on his own behalf

This is a s. 23 application. The applicant seeks an order declaring a document dated March 24, 2018 as fully effective as the codicil to the testator's will dated September 11, 2015. The testator signed the document on the day of her death. The respondent, Mark, opposed the application and sought an order removing the applicant as executor. A second named respondent, Jeffrey, took no active part in the proceedings. He died in 2021. The testator died March 24, 2018.

The applicant, Kim, is one of the testator's children. Mark is a grandson of the testator, adopted and raised by the testator.

The testator's will is dated September 11, 2015. The will gives the residue of her estate to Mark and Jeffrey in equal shares.

On the date of her death, in the hospital, the testator advised two other children, Beverly and Elvis, that she wanted to change her will. Beverly drew up the document. It was titled "Last will and testimony – Doreen Marjorie Pelletier".

It provided that "I would request to have Jonathan Mark Pelletier taken out of (off) my will. I do not want him to reside on my premises as of March 24/2018, Written on March 24/2018 at 5:35 pm at Portage hospital".

It was signed by the testator in the presence of Beverly and Elvis but not attested and subscribed by them. The testator died that evening.

The document is not a holograph will and it was not signed in compliance with the requisite formalities of *The Wills Act*.

Not surprisingly, there was evidence of conflicts between Mark and the other siblings.

There was also evidence of differences of opinions related to the care Mark was providing for both the testator and Jeffrey. Of relevance is that none of the applicant, Beverly or Elvis benefitted personally from the change set out in the document being submitted as a codicil.

While there were suspicious circumstances surrounding the preparation of the document, the Judge found that there were not any suspicious circumstances related to capacity or coercion or fraud.

The applicant was able to dispel any suspicion raised by the circumstances surrounding the execution of the document. The evidence supporting the decision are not repeated here. There was also insufficient reason raised to support dismissing the applicant from the role of executor.

There are some interesting aspects of the application.

First, there was evidence that the testator, while in the hospital, told two of her children, Elvis and Richard, that she suspected she and Jeffrey were being poisoned by Mark "because they had never been so sick". If that was a delusion and if it was instrumental in her decision to cut Mark out of the will, then her capacity would be a live issue. The evidence further indicated that when Elvis and Richard asked for a toxicology test of an attending nurse, the nurse explained that the reason for the testator's condition was because of her illness, being liver failure. When presented with that explanation for her condition, the testator apparently accepted it. That is what a sane person not suffering from a delusion would do. However, the original "delusion" was stated as being related to both her condition and that of Jeffrey. The nurse's explanation doesn't touch on the testator's belief Mark was poisoning Jeffrey. The testator apparently did not raise the issue again. Thus, what might have been a delusion that affected capacity was partly explained and accepted, but may not have been thoroughly canvassed by the respondent, acting on his own.

Second, the Judge characterized the change to the codicil as being a simple amendment to the will because it removed one of two named beneficiaries. While the change may have been a simple one to describe in a document, it is arguably anything but simple, since it cuts out one of two residuary beneficiaries. One might argue that the complexity of the change when considering capacity, coercion, fraud or undue influence ought to be based on the effect of the change on the distribution of the estate, not necessarily the ease with which the change could be described in a document.

Third, the Judge relied on the title of the document as supporting his decision that it was intended as a testamentary document. While there appears to have been a lot of evidence supporting a finding that the document was testamentary, one wonders how much weight should be given to the title of a document when considering its nature.

Is this a case where self-representation foiled the respondent's case? Nevertheless, this is a good case to read for a summary of the court's approach to s. 23 applications.

**John Delaney, John Poyser, Ken Mandzuik, Ryan Gorlick, Andrew Torbiak, and Krista Clendenning.*

*By Rebecca Sherman and Sue Ahn**

Family Law Decision

***Chen v. Ma*, 2022 MBQB 114**
Judgment: May 30, 2022
Thomson J.
Counsel: R.K. Histed, for Plaintiff
K. Land, K.C. Misko, K. Scaramuzzi, for Defendant

This case was about interpreting a provision of an agreement made between the parties on May 31, 2016, concerning child support.

The consent final order and divorce judgment for the case was pronounced by Justice Thomson on September 26, 2016, shortly after the written agreement was made. It granted sole custody of the child to the plaintiff (mother) while the defendant (father) had physical care and control, as the parties would agree, a minimum of two weeks per year. His basic child support obligation and annual income were also determined in said order.

The issue was specifically regarding daycare expenses, which was not addressed in the final order. The agreement included that daycare expenses would be split on an equal 50/50 basis (in paragraph 13). The mother asserted that the father was obligated by this obligation to pay her one-half of the gross daycare expenses, whereas the father argued that this one-half would be calculated as net costs, after the mother received the deduction from childcare expenses permitted under the *Income Tax Act*.

The court noted that it was trite law that contractual interpretation was largely an exercise in giving effect to the parties' intentions. It was established that the court was to make every effort to find meaning in the subject words while refraining from imposing an agreement upon the parties which may not have accorded with their actual intentions. As was determined by the Supreme Court of Canada, "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract."

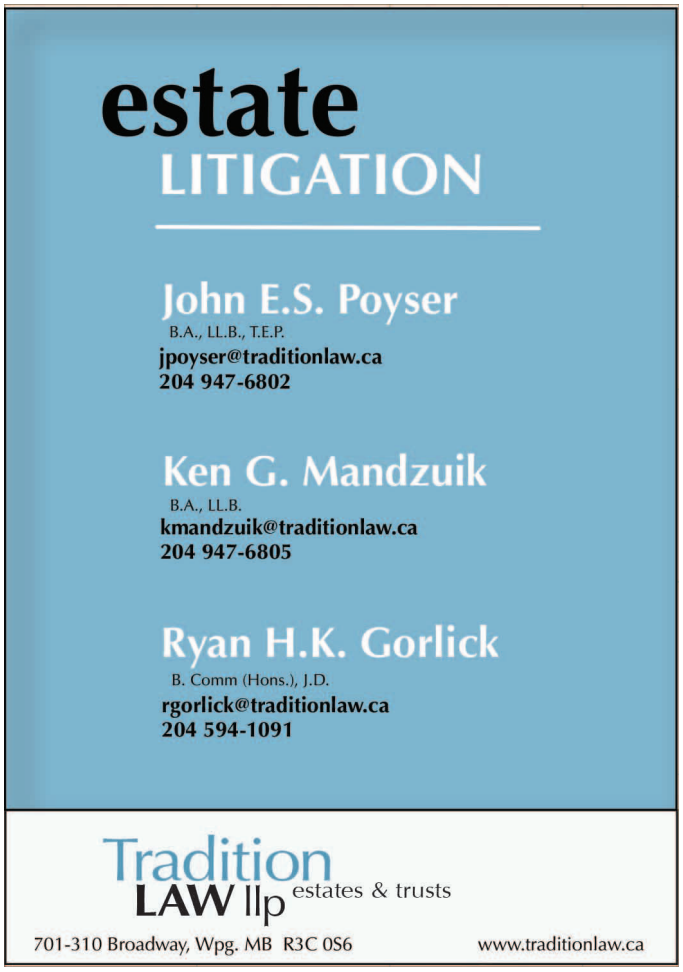
Each party argued that there was no ambiguity in the language of the agreement, and that it was clear and obvious that each of their own interpretations should be endorsed by the court. The court analyzed the language of the agreement, in consideration of the evidence of the factual circumstances in which the contract was formed. Justice Thomson noted that it was obvious that the parties' desire was to resolve the issues and conflict between them, from the breakdown of the relationship, and their intention to adhere to their legal obligations.

The mother leaned heavily upon the absence of explicit mention of the Federal Child Support Guidelines ("Guidelines") in paragraph 13 as supporting her interpretation, but the court rejected this. The preceding paragraphs, paragraphs 10 and 11 of their agreement made explicit the mention of the Guidelines, and paragraph 12 used language which clearly referred to them. The court further recalled s. 7(3) of the Guidelines, which prompted the courts to take into consideration any subsidies, benefits of income tax deductions and credits that related to the expense in question. The court determined that it seemed unreasonable that paragraph 13 intended to ignore the Guidelines, and the impact of the section, particularly as the preceding paragraphs explicitly referenced the Guidelines.

Further, the courts referred to the specific language in the first sentence of paragraph 13, "Daycare expenses shall be shared… on an equal 50/50 basis." The court determined that there was no ambiguity in these words and that they must be read in the context of other provisions in the agreement in this section, under the "Child Support" heading.

The court dismissed the claim of the mother/plaintiff and granted the set-off amount for the father/defendant. Costs were not determined at this time, but court allowed the parties to speak to them in further proceedings, as necessary.

** Rebecca Sherman is an Associate and Sue Ahn is an Articling Student with Sternat Manaigre Law Corporation.*



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Contact: Alissa Schacter
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