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The shift to virtual has forced lawyers to think creatively despite growing demand

CROSS EXAMINED
Melanie Aitken credits her unconventional career route in public service for making her a better lawyer

INDIGENOUS LAW
New mandate will increase Indigenous involvement in major infrastructure projects

TOP ONTARIO FIRMS
COVID-19 threw a wrench in the plans of Ontario law firms, but it was mostly smooth sailing for our winners

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EDITOR'S DESK

Knowledge all lawyers share

All lawyers know the feeling. It starts pretty much as soon as they graduate from law school: getting grilled on an area of law about which they know nothing. The question usually starts with, "Since you are a lawyer, can I ask you a question?" The lawyer's answer invariably begins with, "Since I don't practise that area of law . . ."

While it is true that practising law usually involves mastering a list of rules and precedents in one or a small number of areas, there is a more fundamental body of knowledge that all lawyers do share.

This knowledge is about conducting proceedings fairly, efficiently and with a clear goal in mind. With the pandemic forcing lawyers to shift to virtual proceedings, lawyers across the country have put these fundamental skills to the test.

For estate lawyers, these skills often come into play when they are called on to assess the capacity to consent. With provincial governments allowing witnessing and other procedures to shift online, estate lawyers have had to be creative in assessing consent.

> If the question was about procedural fairness and interviewing techniques, both lawyers could provide similar expertise. It is what being a lawyer is all about.

"Normally, when you're dealing with a client in person, you can watch their face for clues, get a sense of how the family functions," says Lori Duffy at WeirFoulds LLP (p. 32). Even if a relative who is a beneficiary brings the client to the office, Duffy says she makes sure to talk to them in private, something she can't ensure if matters are being taken care of through Zoom calls.

Likewise, in workplace investigations, the shift to virtual has forced lawyers to think creatively about applying their sense of procedural fairness and interviewing skills.

Because witnesses need to have a chance to review statements, Krista Siedlak at TurnpenneyMilne LLP says she will use screen sharing at the end of the interview or read back witness statements to validate them (p. 4).

Siedlak and Duffy are both practising in very different areas of law and, like all lawyers, would not offer advice in an area that they don't practise. But if the question was about procedural fairness and interviewing techniques, both lawyers could provide similar expertise. It is what being a lawyer is all about.

Tim Wilbur, Editor-in-Chief

CONTENTS

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NEWS ANALYSIS

COVID hampers workplace investigations

While investigators have found building witness rapport and seizing documents a challenge during the pandemic, the need for workplace dispute resolution has only grown, writes **Tim Wilbur**

LAWYERS WHO do workplace investigations say that, while the pandemic has not changed their work's fundamental nature, it has created several logistical challenges and amplified pre-existing tensions.

"I think that the pandemic essentially has accelerated some claims or provided breeding ground or new forums that that behaviour can take place on," says Trisha Perry, a former litigator who now advises organizations on workplace conflict resolution with Resonance Inc. in Saint John, NB.

For Nazeer Mitha, a litigator with Harris & Company LLP in Vancouver who conducts misconduct and organization investigations, the growing intolerance for harassment has been one of the most dramatic changes he has seen.

"Employers are being a bit more proactive about trying to address the issues of harassment and sexual harassment and doing training concerning sexual harassment because there is a cultural change," says Mitha.

For Mitha and all workplace investigators, what the pandemic has done is hampered their ability to rely on developing rapport with witnesses.

"In my experience, the best option, without a doubt, is an in-person hearing," says Mitha. "It creates a different dynamic because there's . . . a lot of communication that is occurring that is nonverbal. You don't get the same cues and the same level of information through the electronic means."

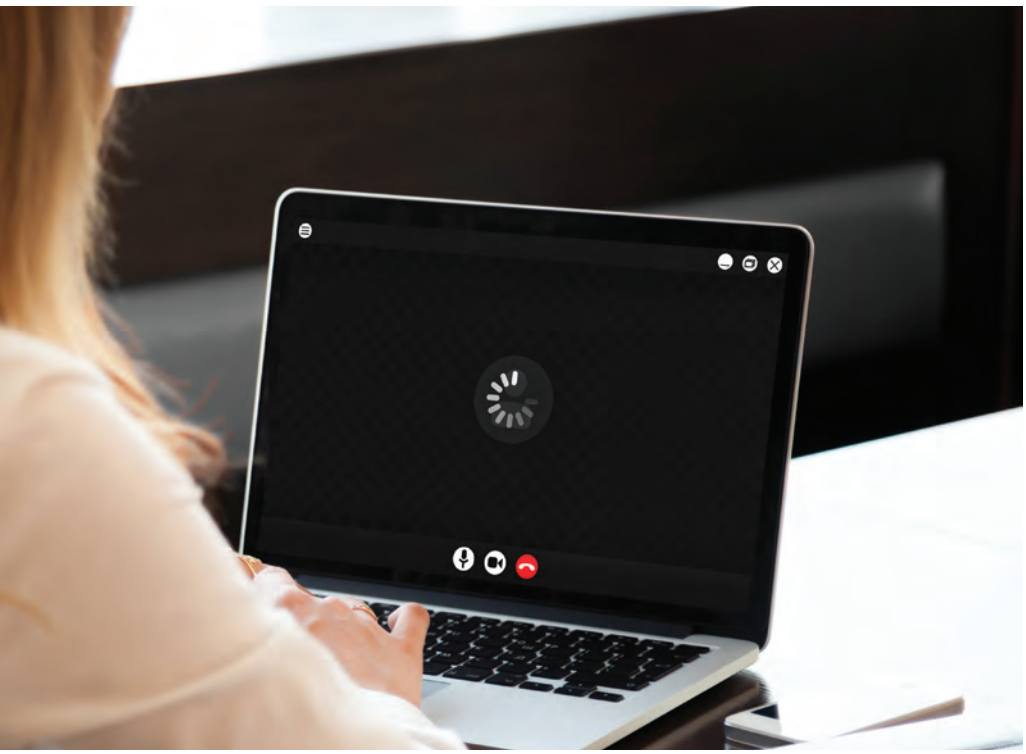
> "[Seizing employee devices] is much harder if you're dealing with five employees [working remotely and] you want to do it simultaneously."
>
> Anthony Cole, Dentons Canada

Krista Siedlak, a partner at Turnpenney-Milne LLP, says the workplace disputes she sees in her investigations have not been that different before and during COVID.

"I think it is the discussions going on in society over the last several years, such as the Me Too movement or Black Lives Matter, that have opened up a broader dialogue in society and a willingness on the part of employees to come forward," says Siedlak. "I also think that with more employees working virtually, it has allowed them, at least in some situations, to be more reflective of what their experiences were when in the workplace and a desire to have them addressed."

Siedlak says procedural fairness and due process are still the top priority when doing workplace investigations during the pandemic, but the tools she uses have changed.

Because witnesses need to have a chance to review statements, Siedlak will use screen sharing at the end of the interview or read back witness statements to validate them. Siedlak says clients or witnesses will sometimes request an interview be recorded,



although she prefers not to do that.

The area Siedlak has found hardest to translate into a virtual setting is group training, which employers may use as part of the conflict resolution process. The mechanics of doing case studies and activities, Siedlak says, can be difficult on a video call.

Anthony Cole, a partner at Dentons Canada in Calgary, helps companies conduct investigations involving criminal or other third-party investigations, such as anti-corruption, civil fraud and anti-money laundering.

Cole, the national co-lead of the firm's white-collar and government investigations practice, says the pandemic has created several logistical hurdles.

"An interview over Zoom on a financial crime is just not going to be [as] effective as face to face," says Cole. He now tends to narrow the scope significantly for online interviews due to its limitations.

His investigations tend to be very "document-heavy," Cole says, and a remote workforce can significantly hamper evidence seizures.

"If you've got a consultant or an employee device, if they're in the workplace, it's relatively easy to take them by surprise," says Cole. "That is much harder if you're dealing with five employees [working remotely and] you want to do it simultaneously."

Cole says new technologies such as the remote capture of images from laptops can help investigators gather evidence when employees are working offsite.

Although most of the investigations on which he works take place over many years, Cole anticipates the pandemic will mean more white-collar crime. Direct procurements for personal protective equipment and government relief programs all provide misbehaviour opportunities.

"Some of the schemes that have been rolled out [by the government] involve huge amounts of money going very, very quickly to keep businesses afloat. If history tells us anything, it's that those are susceptible to fraud."

For Janice Rubin, who does workplace investigations, assessments and training with Rubin Thomlinson LLP in Toronto, the pandemic's effect will be long-lasting for employers.

"I just don't think that employers should underestimate the toll this is taking," Rubin says. "Employers are going to have to wrap their heads around a certain percentage of their workplace who have mental health issues coming out of this." CL

> "[Remote work] has allowed [some employees] . . . to be more reflective of what their experiences were when in the workplace."
>
> Krista Siedlak, TurnpenneyMilne LLP

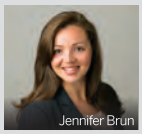
COVID-LINKED INVESTIGATIONS

Janice Rubin says that, in addition to the usual types of issues, she has seen the following themes emerge during the pandemic:

- Behaviour issues on Zoom, social media and other online platforms
- Pandemic fatigue causing poor employee behaviour and overzealous management
- Disagreements over COVID protocols
- Anti-Black racism and how COVID has shone a light on societal inequities

WESTERN UPDATE

NEWS BRIEFS



B.C. branch of CBA releases report on modernizing justice system

For all the havoc COVID-19 has caused, it has shone a spotlight on what is needed to improve British Columbia's justice system, including a digital transformation. The Canadian Bar Association's B.C. branch has released a report that provides a roadmap for modernizing the justice system and relevant provincial legislation. "Agenda for Justice 2021" offers more than 40 recommendations in 22 key areas, touching on what Jennifer Brun, president of the CBA's B.C. branch, calls "everyday situations" affecting people in B.C. The situations may be families undergoing a separation, small businesses settling a contract dispute and rural communities without access to basic legal services.

Legal aid program gives sexual assault complainants faster access

Legal Aid Alberta has launched a new system to help sexual assault complainants quickly find legal representation in cases where their sexual history, relevant emails or text messages and medical records come under scrutiny in a trial. Since mid-January, LAA and the Alberta Crown Prosecution Service have been working together to make it possible for prosecutors to directly get in touch with the non-profit group to find a lawyer that can protect complainants' interests. Complainants can receive up to 10 hours of free legal advice and support under this system, regardless of their financial circumstances.

Mining law and sustainability program tackles climate change

The Peter A. Allard School of Law at the University of British Columbia now offers an Executive Learning Program in Mining Law and Sustainability, focusing on Indigenous issues. The program, which started accepting registrations in April, will benefit mining industry professionals such as in-house lawyers and external counsel, engineers, geologists, environmental managers and Indigenous business and community leaders. The online program will explore the complex legal and regulatory frameworks and environmental challenges in mining and consist of five modules over five weeks, comprising about 30 hours in total.

Alberta introduces amendments to Health Professions Act

Alberta has introduced the Health Statutes Amendment Act, 2020 (No. 2) to make changes to its laws governing health professions. The bill bans a college from acting or representing itself as a professional association. Another proposed amendment will require every applicant to present evidence of good character and inform the college if a regulatory body has disciplined them in another jurisdiction responsible for that profession. Other changes pertain to the processes for reinstating cancelled registration and practice permits and the use of competence committees and continuing competence programs.

New B.C. insurance fairness officer aims to foster transparency

The B.C. government is planning to introduce legislation to create a fairness officer position to promote trust in the Insurance Corporation of British Columbia processes. The position aims to build independence and transparency as B.C. transitions to its Enhanced Care coverage system on May 1, designed to provide customers with savings on their premiums. The new fairness officer will have the power to review customer complaints and make recommendations on how to decide such complaints.

Recent Alberta decisions on 'just cause' firing leaning toward employees

Stikeman lawyers say such terminations of employment should be used sparingly

THREE RECENT Alberta decisions indicate that employers will have an uphill battle to terminate employees for just cause, say lawyers Sheena Owens and Maja Blanchette at Stikeman Elliott LLP in Calgary. These decisions, the lawyers say, show courts are increasingly reluctant to rule in employers' favour.

"It doesn't mean that employers are always going to lose," says Owens. "However, the recent decisions illustrate that 'just cause' is a difficult argument to make and courts tend to favour the employee if there is any discretion to be exercised."

The three Alberta Court of Queen's Bench decisions found that the employers did not have just cause to terminate the employees' employment.

In *Underhill v. Shell Canada Limited*, Shell dismissed Underhill for just cause following an investigation into her behaviour. The case included allegations that she was involved in at least six instances of serious misconduct, such as failing to identify a conflict of interest, breach of confidence and "complete disregard" for Shell's termination and investigation procedures.

The court concluded it was not satisfied that Underhill demonstrated the "serious lack of understanding of conflicts" that Shell alleged. It also noted that Underhill was a

loyal and dedicated employee for more than 17 years, had no prior disciplinary history and Shell did no suffer significant consequences from Underhill's actions.

In *Baker v. Weyerhaeuser Company Ltd.*, the employer alleged that the employee, with 14 years of service, was terminated for just cause due to safety violations and other misconduct.

The court concluded that Baker's supervisor had looked for reasons to terminate Baker and relied on his personal bias against Baker and did not consider Baker's whole record of employment.

> "The recent decisions illustrate that 'just cause' is a difficult argument to make, and courts tend to favour the employee if there is any discretion to be exercised."
>
> Sheena Owens, Stikeman Elliott LLP

A third case, *Mack v. Universal Dental Laboratories Ltd.*, dealt with the allegation that Mack, who was also a shareholder and director, had failed to work with diligence and worked only a minimal and nominal amount of time at the office.

The court also found that Universal had condoned the misconduct. Universal failed to issue any written warnings to Mack and did not follow its performance management process outlined in its employee policy manual.

Absent an enforceable termination provision in an employment agreement, Blanchette says employers have an implied contractual obligation to provide indefinite-term employees with reasonable notice of termination unless there is just cause for termination of their employment.

In some cases, this obligation can be as much as 24 months. If notice cannot be provided, the employer must pay compensation equal to what the employee would have earned had the employee worked through the notice period.

Jeff Kahane
Lawyer
CALGARY

A bit of green paradise

Where: Sicamous, B.C., halfway between Calgary and Vancouver off the Trans-Canada Highway

What: 40 acres with two streams, an old apple orchard and old-growth trees

Why: Jeff Kahane wanted land to help offset the carbon dioxide produced by his office

The audit says: Total carbon stored is 8,990 tCO2e (tonnes of carbon dioxide equivalent), increasing if no changes are made, offsetting yearly office emissions of 177 tCO2e.

Q&A

Calgary lawyer Jeff Kahane buys land instead of carbon credits to help practice go green

Calgary lawyer Jeff Kahane purchased a 40-acre parcel of land in B.C., part of a goal to make his office carbon neutral, along with other changes. He even had an audit done to show it more than offsets the carbon emissions from his practice. We talk to him about the experience.

What made you decide to do this?
It just felt like the right thing to do. I am not a "tree hugger" in the sense of wanting to go out and stand in front of bulldozers to protect the environment. I'm just a normal guy who wants everyone to play their part to the extent they can.

Why buy land in B.C. as a way to go net-zero carbon?
It started when I decided to replace seven furnaces in my building with more energy-efficient ones. Then it was a change to LED lights. And then it hit me. There's all this deforestation globally, so why don't I find some land that I can protect? You can pay for credits to do this, but there's just something beautiful about trees and nature that you can't get in the city.

How did you end up with this piece of land?
I had a real estate agent help me. I thought [about] looking in Alberta but realized prairie wouldn't meet the carbon-neutral goal. I also wanted land that was relatively far from a town or village but close enough that it faced the prospect of being developed one day.

Tell us about this land you bought
It has two streams on it, a forest, as well as an out-of-commission apple orchard that stopped producing decades. There are trees as tall as 60 feet and three feet wide. The man I purchased it from had bought the land in 1972 and really kept it in its natural state.

Where is it located?
It is located halfway between Calgary and Vancouver, off the Trans-Canada Highway near a town called Sicamous. You can hike to it, but the easiest way to get to it is by boat.

And how does the land offset the carbon emissions of your office?
I had a report done by a forester. It says the land stores sufficient carbon, now and in the future, to completely offset the office estimated emissions of 177 tonnes of carbon dioxide equivalent. The total carbon stored is 8,990 tonnes of carbon dioxide equivalent.

What is your message to others?
Not everyone can do what I did. But the message I want to send is, we can make a huge difference if we try to cut our carbon footprint even by five per cent or so.

ONTARIO UPDATE

Proposed changes to judicial appointments process under fire at provincial standing committee

Diversity should not be a 'token gesture,' says Janani Shanmuganathan, a criminal defence lawyer

THE ONTARIO government heard from opponents of its proposed changes to the Judicial Appointments Advisory Committee during a Committee on the Legislative Assembly session on March 11 and 12.

The committee took submissions on proposed laws, including Bill 245, the Accelerating Access to Justice Act. The act would change the Judicial Appointments Advisory Committee's composition and function, which recommends candidates to the attorney general for provincial court appointments. The province says the changes aim to fill judicial vacancies more quickly and increase diversity.

Duff Conacher, co-founder of Democracy Watch, called on Ontario to reverse the act's proposed changes to the judicial appointment process. Democracy Watch will file a court case challenging the new appointments system's constitutionality if the changes are made law.

"Democracy Watch's point is that the Ford cabinet is proposing dangerously unethical changes to Ontario's appointment system for judges that will make the system open to patronage and cronyism and make it unconstitutional because of that political influence and interference that will be allowed," Conacher told *Law Times*.

Criminal defence lawyer Janani Shanmuganathan submitted to the standing committee on behalf of the South Asian Bar Association: Toronto Chapter in late March. In her submission, Shanmuganathan said the increase in the AG's influence over who is appointed "represents a step backward."

"We are moving now much further down the spectrum toward political appointments and away from merit-based appointments. SABA doesn't want this," Shanmuganathan said.

Attorney General Doug Downey addressed these criticisms in an interview with *Law Times* in February.

"Any change is disconcerting for some people. Certainly, people who want to protect the status quo, it's disconcerting for them," Downey said. "I don't think that any part of our justice system is working perfectly, is sacrosanct. I think that we need more diversity in many parts of our selection of judges.

"I've landed in a space where the great majority of the legal profession is quite comfortable. So, all that I can say is, I think, those who are trying to protect the status quo are the outliers on this."

Diversity should not be a "token gesture," Shanmuganathan told *Law Times*.

"You can't just claim diversity without any evidence that these proposed changes are actually going to lead to a more diverse bench," she says. "So, in this circumstance, we don't have any evidence that there are diverse and deserving candidates that are being overlooked by the current lists that are being provided to the attorney general."

NEWS BRIEFS

Animal rights group challenges Ontario's new 'ag gag' law

The animal rights group Animal Justice has filed a lawsuit against the Ontario government, saying recently enacted legislation makes an offence out of Charter-protected methods activists use to expose animal cruelty. The application challenges the constitutionality of several sections of the Security from Trespass and Protecting Food Safety Act. Animal Justice argues that these provisions are directed at key tactics animal rights activists employ..

Uber's pitch to provinces about eluding Employment Standards Act: lawyers

In a recent pitch to provincial governments, Uber Canada advocates for new benefits and protections for app-based gig workers. Uber is calling on governments to require rideshare and food delivery apps to provide workers with contributions for paid time off; health, vision or dental insurance; tuition and education expenses and retirement savings. The company also said the apps should provide additional training and tools so drivers and couriers "feel safe and protected."

Doug Downey
Attorney General of Ontario, MPP for Barrie-Springwater-Oro-Medonte

Legal career:

- Created the first municipal conservation easement in Ontario
- Completed the first court-ordered dissolution of a time-share condo in Canada

Politics

- President of the York-Simcoe Federal Progressive Conservative Riding Association: 1993
- City councillor in Orillia: 2000-2006
- Ontario Small Urban Municipalities Board: 2003-2006l

Q&A

Attorney General Doug Downey on his Justice Accelerated Strategy

What are the modernizing aspects of this Justice Accelerated Strategy?
It is formalizing a commitment and the overall strategy we've been doing. You've seen some of the work already — breaking down the barriers and speeding up services. So, it's a bit of a formalization of what we've been doing to create change.

What can you tell me about the $28.5-million investment in the digital case management system? What is the benefit of this?
We're building on the experience in the B.C. tribunals. They have a really excellent product. And so, back last January, I had a chat with the attorney general of B.C., and we struck a deal to use that product as a base and bring it to Ontario. The benefits of it are demonstrated through the four years of experience that B.C. has. It's easier for people to access. It creates resolutions at a much higher rate and much faster, prior to a hearing, if a hearing is needed at all. So, it's really a different way of doing business, which dovetails perfectly with some of the other things we've been doing.

How will the plan enhance access to justice for Indigenous communities?
We're working with several Indigenous communities to make sure that they have the resources they need to minimize having to leave their community, to create opportunities for resolution faster and cheaper, to make it more accessible. Justice Accelerated, as a strategy, is the touchstone for how we do change. And you'll see over the last year that we've created a different muscle memory on how to change and how to engage. And we're taking that same process into our engagement with the Indigenous communities to create designs and create products that will serve them better.

You said the plan would expand access to remote court services. Where will this expand remote court services? And when is that planned to be rolled out?
Yeah, so in terms of the tribunals piece, it will be available throughout Ontario, 24 hours a day. It's an online product that allows people to engage in and work through their issues. So, that piece will be everywhere.

We also have a stream where we're working on northern and rural courts and court matters to make it more accessible for them. Of course, technology is a huge piece of that, to allow people to not have to travel from different places. Since March of last year, so about a year ago, we have had about 66,000 remote matters taking place. And all the hearings for in-custody are now handled remotely. All of these have an impact on rural and northern communities.

How will the courthouse of the future look?
The courthouse of the future is client facing. It's user facing. It's designing and putting tools in place for people to access that space. Traditionally, courthouses have not been designed with the public in mind, as much as we should have.

So, we'll use new technology to create a better user experience. And we'll use design to create a better experience as well.

Firm launches program for data-informed decision-making in litigation

While the legal profession has been content not relying on data analysis in the past, the goal of a new program promoting data-driven decision-making at Lenczner Slaght is to change that, says commercial litigator Paul-Erik Veel. The Lenczner Slaght Data-Driven Decisions involves harnessing available data-analytics technology and products, staying ahead of the curve on "pioneering empirical research on litigation" and developing its own proprietary data sets and analytics.

Lawyers applaud use of YouTube for Minassian verdict

Using YouTube for the decision on the mental capacity of Alek Minassian, who was responsible for the 2018 Toronto van attack, is a boon to the public's trust in the administration of justice, say criminal defence lawyers Jacob Roth and John Struthers. Streamed online in a live YouTube hearing, Superior Court Justice Anne Molloy ruled that Minassian, who ran down 26 people, was capable of knowing his actions were morally wrong and found him guilty of the murder of 10 people and the attempted murder of 16.

Firms extend funding to U of T Law's Black Future Lawyers program

A new partnership of 14 Canadian firms has announced a 10-year combined financial commitment of $1.75 million to the Black Future Lawyers, a University of Toronto Faculty of Law program to encourage Black students to attend law school. The firms seek to accelerate the achievement of the program goals, including assisting Black students to tackle systemic challenges that stop them from accessing professional education.

OTTAWA UPDATE

NEWS BRIEFS

SCC sets out framework for inconsistent verdicts

An error in instructions to a jury in a sexual crime case did not affect convictions but, rather, it reconciled the apparent inconsistency in the verdicts, the Supreme Court of Canada ruled in March in a decision. The decision will guide appellate courts on inconsistent jury verdicts. In *R. v. R.V.*, the majority of the court found the trial judge had misdirected the jury on the charge of sexual assault against R.V. If inconsistent verdicts can be resolved or explained by a faulty jury instruction, in general, the conviction of the accused can stand.

Competition Bureau, foreign agencies study pharmaceutical mergers

The Competition Bureau Canada has joined a multilateral working group to identify concrete and actionable steps for updating the analysis of the impacts of pharmaceutical mergers, which are often subjected to review in numerous jurisdictions. The U.S. Federal Trade Commission started the joint project, including the European Commission Directorate General for Competition, the U.K.'s Competition and Markets Authority, the U.S. Department of Justice and certain offices of state attorneys general. The group will study competition-related concerns regarding M&A in the pharmaceutical industry and consider remedies for resolving emerging issues.

Convictions restored in Via Rail train plot

Jury selection errors can be remedied if certain requirements are met, the Supreme Court of Canada found in restoring two accused convictions in a plot to attack a Via Rail train. In the unanimous decision in *R. v. Esseghaier*, the court found that the curative proviso of s. 686(1) (b)(iv) of the Criminal Code can be applied to cure jury selection where the trial court has jurisdiction over the class of offence and the court of appeal finds no prejudice suffered by the appellant as a result of the error.

New coat of arms, flag, badge for SCC

On March 15, the Supreme Court of Canada unveiled its new coat of arms, flag and badge, designed by former chief herald Claire Boudreau. The coat of arms includes the laurels from the court's historic badge, created by Montreal architect Ernest Cormier, who designed the Supreme Court building. The Cormier emblem is embedded in the marble floor of the SCC's "Grand Hall" and features the stylized letters S and C, surrounded by laurels. The court also announced its new motto, "Justitia et Veritas," the names of the two allegorical statues standing outside the Supreme Court building.

Human rights ombudsperson creates new online complaint system

The Canadian Ombudsperson for Responsible Enterprise has launched an online form to enable individuals and communities abroad to raise concerns regarding potential human rights abuses caused by the operations of Canadian mining, garment and oil and gas companies operating abroad. The office accepts complaints filed by individuals, organizations and communities alleging negative effects caused by Canadian companies on internationally recognized human rights under the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant Economic, Social and Cultural Rights.

Ottawa's carbon tax is constitutional

Majority of Supreme Court finds matter is of national concern, in Greenhouse Gas Pollution Pricing Act reference

THE FEDERAL Greenhouse Gas Pollution Pricing Act is constitutional in its entirety, and Parliament has jurisdiction to enact this law as a matter of national concern under the peace, order and good government clause of the Constitution, the Supreme Court of Canada has ruled.

The issue before the Supreme Court was whether Parliament had the constitutional authority to enact the act; the majority found that it did.

In a 6/3 decision in *Reference re Greenhouse Gas Pollution Pricing Act,* Chief Justice Richard Wagner, writing for the majority, outlined a three-step analysis for deciding whether a matter is one of "national concern." Parliament may then take charge of matters that might otherwise fall under provincial jurisdiction.

In dismissing the appeals by the Attorney General of Saskatchewan and the Attorney General of Ontario, which challenged the constitutionality of the act — and in allowing the appeal of the Attorney General of British

Columbia v. the Attorney General of Alberta — the majority held that the federal government had the right to do so. This right existed because reducing greenhouse gas emissions is a matter of national concern under the "peace, order and good government" section of the Constitution.

In considering Parliament's authority to enact the GGPPA, wrote Wagner in his reasons, "the Court must give effect to the principle of federalism, a foundational principle of the Canadian Constitution, which requires that an appropriate balance be maintained between the powers of the federal government and those of the provinces."

"Federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter."

Determining that a matter is one of national concern involves a three-step analysis, Wagner wrote.

"First, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. . . .

"Second, the court must undertake the analysis explained in *Crown Zellerbach* through the language of 'singleness, distinctiveness and indivisibility.' . . . The first of these principles is that . . . jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The second principle . . . is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter."

If these two principles are satisfied, the court proceeds to the third step to determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers between the federal and provincial governments.

Troy McEachren
Partner
MILLER THOMSON LLP

Fast facts:

- Years in practice as a private client lawyer: 22
- Significance of amended MAID legislation on his law practice: "My clients are sometimes at an age or illness level where this comes into play. I had a client who was concerned about the limitations of the legislation before it was changed. We discussed at length, and he wanted to know if his family could bring him to a less restrictive jurisdiction. My next call is going to be to that family to discuss it further and say, 'The circumstances appear to be changing, and we need to see how Quebec will respond, but one expects it to comply.' These are real issues that we as lawyers deal with regularly; we have to be informed and help clients in their planning.

Q&A

Medical assistance in dying is expanded

With the passage of Bill C-7 into law on March 17, Canadians have expanded rights to medical assistance in dying (MAID), legislation that was first enacted in 2016 through amendments to the Criminal Code. The amended legislation addresses the constitutional issues raised in recent cases such as Quebec's *Truchon c. Procureur général du Canada* and more closely aligns with the Supreme Court of Canada's 2015 decision in *Carter v. Canada (Attorney General)*, says Montreal private client and estate and trust lawyer Troy McEachren.

Were these amendments to the Criminal Code anticipated?
I think it was very much expected. At the time the legislation was introduced following the *Carter* decision, constitutional commentators correctly identified that what the government enacted in the Criminal Code in 2016 was much more restrictive and did not comply with the Carter decision. That decision was quite clear on two fronts: You had to consent to the termination of life and have a grievous and irremediable medical condition. It came as no real surprise that those 2016 changes to the Criminal Code would be challenged and that the challenge would be successful.

How does the amended legislation address that?
The Criminal Code modification appears to be much more in line with what the Supreme Court found to be constitutionally permissible within the *Carter* decision; imposing the requirement of being imminently near death was a far greater restriction on access to end-of-life assistance than the Constitution requires. The *Truchon* decision from Madam Justice Christine Baudouin makes it quite clear that all of the people involved were able to consent, and she took great care to describe that none of them were in a state of depression.

The government has now imposed a 90-day waiting period between the first assessment for MAID eligibility and the date of the procedure when natural death is not foreseeable. This safeguard is welcome.

How has consent been expanded?
It was always understood that you had to be able to consent at the time that the procedures were implemented. Now, if you've consented to that assistance in dying and you specify a date, and if you lose your capacity to consent before the date arrives, then the medical professionals can still grant your wishes. So, that is a real step ahead.

It is possible to design a system with mechanisms that are protective and respectful. That slippery slope that we fear — that someone is coerced — doesn't seem to bear empirically out. I think that's key.

The most difficult MAID scenario is dealing with mental illness. I'm glad the government has created a panel with a two-year mandate to determine how to deal with this because the capacity to consent can be affected by mental illness.

PUBLIC SERVICE AS A COMPETITIVE EDGE

Melanie Aitken always felt that public service would make her a better lawyer, and her current role has proven her right

MELANIE AITKEN first realized she felt a calling to public service in the late 1990s when she was litigating the Superior Propane case against the Competition Bureau.

"It was, in our world, a big case," says Aitken, who was a partner at Davies Ward Phillips & Vineberg LLP at the time. "It was the first case where the efficiencies defence was relied upon. And because we didn't think efficiencies was going to be that important, I was put in charge of efficiencies."

As luck would have it, the efficiencies argument became very important, and Aitken took the case to the Supreme Court of Canada.

But what struck Aitken when she worked on this case was how fascinating the government's role was.

"I think it was eye-opening for me to see how interesting the job was on the public side. . . . It was a much more complex exercise in the sense of the constituencies that needed to be consulted and satisfied."

A few years later, Aitken left Davies to take a role as senior counsel at the Department of Justice in Ottawa. After that two-year secondment, Aitken joined the partnership at Bennett Jones LLP in 2003.

She stayed at Bennett Jones until 2005, when she accepted a role that puzzled many of her private practice peers at the time: senior deputy commissioner of competition, mergers at the Canadian Competition Bureau.

"I think it was eye-opening for me to see how interesting the job was on the public side. . . . It was a much more complex exercise in the sense of the constituencies that needed to be consulted and satisfied."

"I do recall everyone kind of scratching their head as to why I would do it. And to me, it didn't seem like such a crazy thing," says Aitken. "I also looked south of the border, where there's a much more robust revolving door, particularly in areas like antitrust, where just about anybody who's anybody in the field has at least one tour of duty in one of the agencies."

Aitken took her unconventional and more U.S.-based approach to the Competition Bureau in a now well-known tenure as the Canadian Commissioner of Competition from 2008 to 2012. Her focus on aggressive enforcement and high-publicity cases brought the agency out of the shadows and made her much better known than the average bureaucrat.

When Aitken's tenure ended, she moved to Washington not knowing what she would do.

"I'm one of those people who strongly

PROFILE

Name: Melanie Aitken

Current position: Co-head, Competition, Antitrust & Foreign Investment, Bennett Jones (US) LLP

Key dates:

- **2013:** establishes U.S. presence of Bennett Jones in current role
- **2008-2012:** serves as Canadian commissioner of competition
- **2006-2008:** serves as senior deputy commissioner of competition, mergers
- **2003-2005:** litigation and antitrust partner, Bennett Jones LLP
- **2001-2003:** senior counsel, Department of Justice Canada
- **1994 – 2002:** litigation partner, Davies Ward Phillips & Vineberg LLP

CROSS EXAMINED

RECENT EXPERIENCE

Aitken's recent experience includes acting for:

- Tiffany & Co. in connection with the US$16-billion transaction with LVMH
- Mylan Inc. in its US$5.3-billion acquisition of generic drug assets from Abbott Laboratories
- American Airlines in its defence to class actions alleging capacity discipline and COVID-related complaints
- Bristol-Myers Squibb in its US$74-billion acquisition of Celgene
- Allergan plc. in its US$63-billion sale to AbbVie
- Fiserv, Inc. in its US$22-billion acquisition of First Data
- Time Warner in its US$85-billion acquisition by AT&T
- Alere, Inc. in its US$5.3-billion acquisition by Abbott
- St. Jude Medical Inc. in its US$25-billion acquisition by Abbott
- Starwood Hotels & Resorts Worldwide, Inc. in connection with its US$12.2-billion acquisition by Marriott International, Inc.
- Anheuser-Busch InBev in its US$103-billion acquisition of SABMiller

believe in conflict of interest. I wouldn't talk to anybody while I was still in the job."

While it was a risk, her public service experience proved to be highly valuable for what she calls "professional leapfrogging" into her current role.

Hugh MacKinnon, CEO of Bennett Jones, approached Aitken about starting a Washington office.

"I remember thinking this is the best idea or the worst idea because nobody's ever done it before," Aitken says.

While Aitken has been in private practice ever since, her time in public service allows her to offer insights that many of her competitors, especially those in Canada, can't.

"I'm able to offer a better perspective in terms of risk assessing, who may have an issue, why they may have an issue," she says.

Aitken says having more private practice lawyers in public service would also help regulators, but several impediments make it particularly difficult in Canada.

One is geography since, unlike the trip from Washington and New York, lawyers can't commute to Ottawa from cities like Toronto and Vancouver. The other is the time commitment to become bilingual.

"For people who are at a very important stage in their career, in their early 40s, as I was when I went in, it is a daunting idea to learn French."

> "After I came out [of the Competition Bureau], everybody now listened, when perhaps they might not have considered me to have the credibility that I then had."

What may have seemed daunting at the time, though, is now paying off in spades.

"After I came out [of the Bureau], everybody now listened, when perhaps they might not have considered me to have the credibility that I then had. So, you can do all the analysis in the world and have the greatest idea in the world, but if nobody listens, it's very hard to make an impact."

In addition to Canadian legal expertise, Aitken can also provide insight into how U.S antitrust regulators think, having worked alongside them when she was a regulator.

Outside of the large deals, she also points to some of the "unusual mandates" she has had in her current role. As a member of an "advisory counsel" created by CEO Carlos Brito of Anheuser-Busch InBev for its US$103-billion acquisition of SABMiller, Aitken worked with former enforcement heads from around the world to strategize.

That role was "great fun" as Aitken was "getting together and talking about how are we going to deal with the geopolitical foreign investment [and] antitrust risks?"

With debates about the regulations of Big Tech and a new U.S. administration in the White House, Aitken's role has taken on an even more vital for her clients — anticipating the next move of regulators that are becoming more aggressive.

While she remains "assiduously not political," Aitken does voice strong opinions on how competition and antitrust cases should be approached by regulators and governments on both sides of the border.

"I would like to see more enforcement [and] more resources to enforcement, not necessarily a change in the law. . . . They need to take surgical cases . . . conduct cases, mergers, whatever they are, rather than try to take on" large tech companies too broadly.

For Canada specifically, Aitken says that, although it does not have "a very deep enforcement record," it will no doubt be looking at what happens in the U.S.

If that means competition enforcement ramps up, Aitken's commitment to public service will only continue to serve her in her role. CL

Your five-step privacy protection plan

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YOU STORE A lot of valuable data. Lower the risk of getting hacked by knowing how to protect yourself and your clients from cybercrime. Whether you work alone, in a small firm or manage a big team, the insurance experts at Lawyers Financial suggest starting with a simple five-step plan.

Step 1. Identify your most critical information

Everything is critical when it comes to a law firm's data, but some information is especially sensitive. Identify where your firm stores its most valuable data and intellectual property and ask your IT team to start there. Then, schedule the next phase of work so that everything else gets protected.

Step 2. Write (and print) a simple response plan

This is your "what now" plan. Its job is to identify everyone you need to call the instant anyone in your firm becomes aware of a data breach. This plan should be simple enough to be printed on a single page. And it absolutely should be printed. If a hack keeps you and your team from logging into your computers, you'll be glad to have those emergency contacts on hand.

Step 3. Empower your team

Before COVID-19, you could turn to your coworkers and ask, "Did you get that weird email from payroll?" Proximity may have given firms an extra layer of protection. Now that so many of us are working remotely, the first line of defence against cybercrime is thinly spread. Make sure your security policies acknowledge the reality that people are working from home and using cellphones and tablets for company business. And train your team to make sure everyone understands their role in protecting private information.

Step 4. Test your plan

Hire an independent company to stress test your network security. Getting a clean bill of health will give you confidence that you're doing what's necessary to protect your firm and your clients.

Step 5. Avoid conflicts of interest

Make sure the people responsible for maintaining your network are empowered to report any potential problems — no matter where they start. Blame doesn't belong anywhere near your five-step plan. When a vulnerability is spotted, all that matters is dealing with and eliminating it as quickly (and with us much transparency) as possible. Close the breach, then ask what you can improve. Fortify your defences with affordable office insurance.

The unfortunate truth is that you can do everything in your power to prevent cybercrime and still become a victim. If that happens, insurance can help cover the cost of recovering data and any potential damages. Experts at Lawyers Financial remind people that anyone who stores confidential information in any format is vulnerable to cybercrime. The responsibility to protect client data is particularly important for lawyers and firms because they are entrusted with so much important and valuable information about clients. That's what makes insurance so essential.

What's covered?

When you purchase office insurance that includes cyber and privacy breach protection, your firm can get a wide range of coverage that includes protection against:

- Damage to your systems or third-party systems due to a computer virus or hacking
- Employees hacking your network
- Breach of Canadian privacy legislation
- Breach of intellectual property rights
- Misleading advertising
- Breach of employees' privacy rights
- Failure to handle, manage, store or destroy data correctly
- Consequences to your business due to downtime
- Business interruption
- Libel, slander and extortion as a result of a data breach
- Breach of intellectual property rights or confidentiality
- Lost revenue or assets due to a computer virus or hacking attack
- Breach of statutory duties regarding the advertising or sale of goods or services by e-commerce
- Competitor infiltration and corruption of your systems
- Financial loss to a third party due to dishonesty of your employees

Risk management is equal parts knowing how to protect yourself, knowing what to do in case of an attack and knowing how to make cybersecurity an ongoing part of your workplace culture. Planning and vigilance are your best bets when it comes to reducing risk. A Lawyers Financial office insurance policy is your financial backstop.

Learn more and apply for affordable coverage at lawyersofficeinsurance.com. CL

COLUMN: BANKING ON CORPORATE

Contract drafting in good faith times

Decision in *Callow* answered the question of when not volunteering information to the other contractual party becomes impermissible misleading conduct

AS A CORPORATE lawyer often engaged in contractual drafting, I'm an automatic contestant in the discretion Olympics. In the conventional world, the word "discretion" often implies tactfulness and caution. But in the commercial legal realm, the focus is on the other meaning, and caution is tossed to the wind. Judging in these Olympics is based on the mandatory elements — absolute discretion, unfettered discretion, sole discretion and unchained, unbounded and unrestrained discretion — and then there are, of course, points for artistic impression.

The funny thing about the discretion Olympics, based on some recent jurisprudence, is that there truly are no prizes. No matter how artistic the drafting of limitless discretion, the principle of good faith in contractual performance may intervene.

The baron de Coubertin (father of the modern Olympic Games) of this narrative is the Supreme Court of Canada's 2014 decision in *Bhasin v. Hrynew*. In that case, the court unanimously held that there is a common law duty applicable to all contracts to act honestly in the performance of contractual obligations. The Supreme Court recently further addressed the duty of honesty in contractual performance in *C.M. Callow Inc. v. Zollinger*, and with it the omnipresent question of what conduct by a contractual party causes the permissible act of not volunteering information to the other party to become impermissible misleading conduct.

The central issue in Callow was whether a group of condominium corporations in Ontario, known as Baycrest, had breached the duty of honesty in relation to its maintenance contracts with C.M. Callow Inc. Baycrest had two maintenance contracts with Callow, one for winter and one for summer. Baycrest decided to exercise its right to terminate the winter contract, but it did not notify Callow. Instead, it engaged in discussions about renewal, and it allowed Callow, which believed that renewal was likely, to perform "freebie" landscaping work in order to encourage Baycrest to renew. Baycrest eventually terminated, and Callow sued.

At trial, Baycrest was found to have breached its contractual duty of honest performance due to its delay in invoking the termination right while actively deceiving Callow. That decision was overturned by the Ontario Court of Appeal, essentially on the basis that Baycrest was free to terminate pursuant to the agreement and had no unilateral obligation to disclose information relevant to the exercise of that right.

A majority of the Supreme Court restored the judgment of the trial judge. The Supreme Court recognized that the duty to refrain from lying to or knowingly misleading the other party about matters linked to the performance of the contract generally does not impose a positive obligation on contracting parties to disclose. The majority nevertheless determined that the manner in which Baycrest exercised its termination right breached its duty of honest performance, which applies to all contractual rights and obligations, even seemingly "unfettered" contractual rights. The majority held that Baycrest's deceptive conduct was sufficient to establish a breach of its duty of honest performance.

The concurring judges took a similar approach, focusing on Baycrest's conduct preceding the termination to determine that Baycrest was required to correct Callow's misapprehension. The lone dissenting judge concluded that Baycrest had not materially contributed to Callow's misapprehension and, therefore, had not breached its duty.

The decision poses natural challenges for commercial lawyers advising clients about contract drafting and compliance. There may be obligations — or limitations — in relation to contractual provisions other than what is written in the document. Further complicating matters is the issue of consequence. The court's majority held that expectation damages (that is, damages that put the injured party in the position that it would have been in had the duty been performed) should be awarded, and the concurring opinion believed reliance damages (that compensate the injured party for losses sustained in reliance on the dishonest performance) to be appropriate. Advising on the relevant standard, therefore, is uncertain, putting aside how standards would apply in a given circumstance.

There is some irony in Callow's name, in this case, in that the word means inexperienced or immature, suggesting a naiveté. That would be unfair, in that Callow was misled, and might lead to a whole unfair string of Callows humour. On the other hand, nothing in this Supreme Court judgment suggests that we should not be entitled to our unqualified indiscretions. CL

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law. He can be reached at nmay@goodmans.ca. The opinions expressed in this article are his alone.

SPECIAL REPORT

CANADIAN Lawyer

MAKING IT THROUGH A TOUGH YEAR: TOP 10 ONTARIO REGIONAL FIRMS FOR 2021

COVID-19 threw a wrench in the best-laid plans of Ontario law firms, but it was mostly smooth sailing for our winners

CONTENTS PAGE

TOP 10 ONTARIO BOUTIQUES: Embracing change and pushing through the pandemic

IF THERE WAS ever a time to test a law firm and its ability to prepare for the unknowns of the future while coping with today's problems, it was 2020. COVID-19 challenged lawyers to figure out how to best keep best their practices going while finding the mental resources to deal with the added stress of a pandemic that kept them and their families at home.

But winners of *Canadian Lawyer's* top Ontario boutique law firms for this year all say that, while last year will go down as one of the toughest ever, they managed to stay focused. In the process, they embraced the technology that has allowed the legal system to function, even if that means doing things differently.

"They certainly didn't teach us how to deal with this stuff in law school," says Wayne Egan, managing partner at Ontario regional top 10 firm winner WeirFoulds LLP. "Nobody was really ready for any of this, but we all learned to adapt pretty fast."

Adds Michael Slan, managing partner at winning firm Fogler, Rubinoff LLP: "For us and a lot of other firms, it was learning as we went along, and adopting technology at a much faster pace than we had thought of before — because we had to. I see a lot of solutions that will make things happen faster, and cheaper," he says. "It is all about being nimble."

As Beard Winter LLP managing partner Victoria Winter says, "It is now more important than ever to have the relevant technology to allow lawyers and staff to work efficiently and effectively from home."

The good news, winning firms say, is that a silver lining emerges from the chaos of COVID-19 in the form of using technology more effectively in the legal system.

"For us and a lot of other firms, it was learning as we went along, and adopting technology at a much faster pace than we had thought of before."

Michael Slan, Fogler Rubinoff LLP

"We've learned in this past year that not only can we survive, but we can [also] do better than that," says Samantha Prasad, who sits on the executive committee of Minden Gross LLP. What the firm's growth during COVID-19 has demonstrated "is that we need to continue to create the support for that growth, and so we have to continue our investment in technology."

Jeffrey Cohen, managing partner at Torkin Manes LLP, which took top spot this year, says: "Once the initial shock was done, the profession actually really stepped up. And I think the justice system and the court system embraced the technology."

John Russo, managing partner at Pallett

COVID-19 AND THE ONTARIO SUPERIOR COURT OF JUSTICE

- **In-person hearings.** All non-jury matters should proceed virtually unless an in-person hearing is necessary. Courtrooms will be subject to a 10-person limit.
- **Remote hearings.** All case conferences will be held by telephone conference unless otherwise specified. Matters that may be heard remotely include unopposed motions and applications, opposed short or long motions and applications, and class action case management conferences.
- **Jury.** All jury trials are suspended for now.
- **Filings.** The court will accept filings via email. The court has also relaxed procedures related to commissioning affidavits.
- **Commercial list.** The court cannot hear any matters of more than four hours' duration. All contested matters will be heard by teleconference using Zoom or other video tool.

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Valo LLP., another winning firm, says that the most significant trend to have emerged is "the move to embrace and enhance technology in all areas of practice." Noticeable changes have been in areas related to litigation: commercial, construction, insurance, and trust and estates.

"Virtual hearings and examinations, virtual meetings with clients [have] caused a dramatic change in how we do business.," Russo says. "This has also led to increased focus on the importance of the right technology and infrastructure to provide stability and safety."

"The fact that we can have more remote hearings, that documents can be handled more electronically for legal purposes will just make it more beneficial to both law firms and clients."

Maria Scarfo, Blaney McMurtry LLP

Cost efficiencies and saving time

Maria Scarfo, managing partner at Blaney McMurtry LLP, says she believes that law firms will keep all the efficiencies that have been picked up during COVID and build on them.

"The fact that we can have more remote hearings, that documents can be handled more electronically for legal purposes will just make it more beneficial to both law firms and clients," she says. "It will drive down some of the costs associated with providing legal services, and I think that the clients are going to continue to enjoy that, and I think lawyers will like it, too, because it can make them more productive."

Lawyers at the winning firms say the use of technology won't necessarily work for all types of legal proceedings, but it will certainly cut down on much of the back-and-forth to court for brief appearances that Zoom or other video means could handle.

"I'm especially talking about those short hearings that take about 10 minutes, but you have to travel to court, and then wait, and it takes up a lot of time," says Eagan. "I can see using what we've learned about technology during COVID-19 to deal with many of the court backlogs that we've had for a long time."

Egan envisions a hybrid system developing where some proceedings, like most trials, would be done in courthouses, while other types of hearings could be handled by remote and virtual means.

Business better than expected despite COVID-19

While COVID-19 threw the legal system for a loop, especially in the early stages, most of the winning firms acknowledge that they hoped for the best and prepared for the worst and business was better than expected, picking up steam as 2020 went on.

"We were surprised at what we thought should happen and what did happen," says Fogler's Slan. "Momentum built throughout the year on the corporate side, with low-interest rates helping," he says, and many matters that might have been litigated in the past were instead resolved by negotiation.

HOW WE DID IT

To come up with our Top 10 Ontario Regional Firms list, *Canadian Lawyer* asked lawyers, in-house counsel and clients from across Canada to nominate firms worthy of being ranked. We took that list, created a survey and pushed that survey through all our channels to summon the widest participation possible. Respondents' rankings were based on firms' regional service coverage, client base, notable mandates, service excellence and legal expertise, and we included an opportunity for respondents to suggest a firm not already on the list. To be included, firms had to have offices in Ontario exclusively and offer a wide range of legal services. Voters ranked firms from one to 10, with first-place votes earning 10 points and points decreasing by one up to one point for a 10th-place vote. Points were added up and firms ranked accordingly.

Scarfo says she noticed the employment and labour law practice being accessed more by clients. Commercial real estate and leasing issues, for both the tenant and landlord sides of the equation, also became more prevalent. Queries on insurance coverage for business interruption increased, as did estates and trust work. Scarfo has even noticed an increase in claims relating to long-term care homes related to COVID-19. What she has not seen as much as she first expected are cases dealing with bankruptcy and insolvency, thanks to patient lenders and creditors and government emergency relief.

Adds Cohen from Torkin Manes: "The fears that we had ultimately never came to fruition and our revenue numbers rebounded. And, in fact, [they] not just rebounded, but accelerated dramatically in the fourth quarter, to the point where, we made up virtually all that we had [lost]."

Egan says that, although his firm noticed some drop-off in the municipal law practice and construction law, "it came roaring back"

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TOP 10 ONTARIO BOUTIQUES

COVID-19 AND THE ONTARIO COURT OF APPEAL

- **Hearings.** The Court of Appeal will no longer be conducting in-person appeals until further notice. All appeals will be conducted remotely during this time. For July and August 2021, it will only hear appeals on grounds of urgency.
- **Filings.** All documents on any matter must be filed electronically. If hard-copy materials have already been filed, parties must file electronic copies in text-searchable PDF.
- **Affidavits.** If an affidavit of service cannot be commissioned due to COVID-19, the affidavit must still be completed, signed and e-filed, accompanied by an explanation.

"We want to make sure that our firm is diverse and inclusive in our hiring practices. It's also about recognizing what outside factors are there that are affecting our lawyers."

Samantha Prasad, Minden Gross LLP

as the year went on. He, too, says he noticed an uptick in estate and trust work as the pandemic "made more of [us] look inward, and we perhaps had more time to [look into] these things."

Winter says her firm saw the health group expand its life and critical illness retainers, in addition to its traditional defence of short-term and long-term disability policies. The estate planning practice saw an increase in the volume of files "in response to the threat of the virus and as a result of clients having more time at home to address their estate planning needs."

Family law also saw an uptick in volume as individuals in long-term relationships elected to cohabitate during the shut-downs. In other cases, relationships "did not survive the external stress imposed by the pandemic."

Diversity, equality and inclusion top of mind

While the pandemic was top of mind at Ontario law firms, there's been increasing emphasis on equality, diversity and inclusion concerns.

The Ontario Bar Association and its president, Charlene Theodore, have been providing an array of tools to achieve diversity benchmarks through the association's Not Another Decade initiative. Theodore says it is about "making sure that the headlines we saw about the legal profession in 2020 are different a decade from now."

"The OBA is throwing our hat over the wall on ending racial inequality and then providing a road map for going after it," says Theodore. Lawyers have a critical role to play to work together "on the problem of anti-Black racism, on the need for reconciliation

"They certainly didn't teach us how to deal with this stuff in law school. Nobody was really ready, but we all learned to adapt pretty fast."

Wayne Egan, WeirFoulds LLP

with Indigenous people and on equality for people of colour."

John Russo at Pallett Valo says his firm is rising to the challenge, with initiatives including firm-wide training to fight unconscious bias, setting up a diversity and inclusion committee and broadening outreach efforts when it comes to recruiting.

Prasad at Minden Gross notes that her firm is also taking on the issue of diversity and inclusion. "We want to make sure that our firm is diverse and inclusive in our hiring practices," she says. "It's also about recognizing what outside factors are there that are affecting our lawyers." Getting a handle on the challenge means looking at issues ranging from gender, disability, race and colour to those surrounding parenthood or other family obligations."

This year's Ontario top regional boutique winners also say that, if there is one message to come out of the pandemic, it is the need for empathy.

"We need to understand what people are going through and how do we assist them if we can," says Slan. "And we need to appreciate our lawyers, our staff, and how they get the job done, even under sometimes challenging conditions."

Minden Gross LLP

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Website: mindengross.com

SAMANTHA PRASAD

Partner and member of executive committee
MINDEN GROSS LLP

The key to a successful law practice, says Samantha Prasad, a member of the executive committee at Minden Gross LLP, is transparency. Why? Because it "opens the door" to communications with colleagues, staff and clients.

"We aren't who we are without each unique part of our firm," says Prasad, who joined the firm as an articling student in 1998. So, communicating and being transparent is vital, she adds, noting that Minden Gross, one of the firms picked as a Top 10 Ontario Regional Law Firm, allows her to have the voice and tools to help build her practice and guide the firm's course.

Prasad says that when she was named to the firm's executive committee in 2020, the first thing she did was send out an email asking those at the firm to tell her what was important and where Minden Gross could improve. What came out of that were important discussions on performance review, inclusion and diversity training, and hiring practices. Prasad says those changes had already been in the works but that hearing from members of the Minden Gross family helped clarify that discussion.

Prasad is a partner in the tax law practice at Minden Gross. (Having started in corporate law as a student, she realized after a rotation in tax how much she loved being a "tax nerd.") The firm was founded in 1950 as a real estate boutique. It has grown to a business-focused firm with 10 formal practice areas, including litigation, corporate-commercial, employment and labour, leasing, financial services and tax law.

Prasad says the firm recently added a securities and capital markets practice, which has become increasingly busy. It's an excellent example of how Minden Gross has grown business as its clients' needs grow.

"We see [our clients] transitioning into the next phase of corporate life," she says, "and they want us along for the ride."

Still, Prasad says the firm acknowledges that investing in the firm's "greatest resource" — its people — is top of mind. COVID-19 makes clear the importance of ensuring staff are mentally and physically healthy. She says the firm's leadership understands the need to reach out and "make sure that everyone is OK," whether through regular meetings or weekly emails with tips on mental wellness.

And that's one of the advantages of being a mid-size firm in Ontario, says Prasad, pointing out that, a decade or so ago, large firms were gobbling up smaller practices.

"We've grown, and this is something I really love to say, we've grown organically. I think that's truly key and says a lot about who we are as a firm."

MINDEN GROSS LLP AT A GLANCE

65
Number of lawyers

30
Number of partners

108
Number of support staff

1950
When firm was founded

Main areas of practice: real estate, corporate and commercial, financial services, litigation, securities and capital markets, employment and labour law, tax and estate planning

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Energy regulator announces Indigenous Advisory Committee mandate

This mandate, like Canada's implementation of UNDRIP, will affect Indigenous involvement and engagement in major infrastructure projects, writes **Elizabeth Raymer**

ON FEB. 18, the Canada Energy Regulator announced the mandate of its Indigenous Advisory Committee. According to the CER, this committee will comprise only Indigenous members. It will play "a key advisory role to the [CER board of directors] on how best to enhance the involvement of Indigenous peoples and organizations in respect of CER-regulated infrastructure and other matters."

This new committee, and other factors such as implementing the United Nations Declaration on the Rights of Indigenous Peoples in federal and provincial law, will affect Indigenous involvement and engagement in major projects and infrastructure and get energy projects approved.

The new IAC mandate should achieve "a more informed regulatory body, which will eventually translate to the regulated community and even the general populace," says

this will not be developed or attained unless the IAC's advice is actually received and incorporated into the CER's mandates and regulatory operations in a legitimate and meaningful way."

The IAC launched in August 2020, and its inaugural meeting took place the following month. Its overarching mandate is to advise the board on how the CER can build a renewed relationship with Indigenous peoples. It will not deal with specific CER-regulated projects, detailed operational matters or regulatory decision-making or provide advice on any particular decision, order or recommendation made by the CER's commission.

The legislation that created the CER in 2019 required an advisory committee, says Terri-Lee Oleniuk, a partner at Blake Cassels & Graydon LLP in Calgary with a specialization in regulatory, environmental and Indigenous law issues. That legislation — Bill C-69: An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts — didn't set out the function of the IAC. "These terms of reference are the first window into how the committee will function," she says.

"The [Indigenous Advisory Committee] mandate will hopefully permit the [Canada Energy Regulator] to improve . . . trust and legitimacy with First Nations, the Métis Nation and Inuit in how it carries out its mandate."

Scott Stoll, Aird & Berlis LLP

Scott Stoll, a partner in Aird & Berlis LLP in Toronto, whose practice includes energy, First Nations and infrastructure.

"The mandate will hopefully permit the CER to improve the level of trust and legitimacy with First Nations, the Métis Nation and Inuit in how it carries out its mandate," Stoll says.

"Improved trust will reduce challenges and uncertainty of CER decisions," he adds. "However, it is important to recognize that this will not be developed or attained unless the IAC's advice is actually received and incorporated into the CER's mandates and regulatory operations in a legitimate and meaningful way."

Indigenous groups have participated in energy and infrastructure projects for quite some time, either through participating in regulatory processes, through consultation with the Crown and through other monitoring committees that exist at an operational level, she adds. "The big difference with this advisory committee is that it's not going to be functioning at an operational, project-specific level; they're really interacting with the CER at a board level, and so the recommendations and guidance that come out of the committee are going to be on strategic and governance matters at a high level."

One complaint by Indigenous people has been their lack of participation in environmental review processes, says Matt McPherson, a partner at Olthuis Kleer Townshend LLP in Toronto. McPherson advises First Nations and Indigenous governments and organizations across Canada. He says he believes the IAC's role will be relatively limited as it will be "several steps back" from the decision-making process that affects First Nations.

Impact of 'new norm' on Indigenous engagement

Informed, regulated entities "will likely be out in front in trying to understand where

BACKGROUNDER ON BILL C-15

- The bill to implement the United Nations Declaration on the Rights of Indigenous Peoples is currently at first reading
- Once passed, this legislation would require the Government of Canada, in consultation and co-operation with Indigenous peoples, to:
  - » take all measures necessary to ensure the laws of Canada are consistent with the UNDRIP
  - » prepare and implement an action plan to achieve the UNDRIP's objectives
  - » table an annual report on progress to align the laws of Canada and on the action plan

Source: Department of Justice Canada

INDIGENOUS LAW

ROLE OF THE CANADA ENERGY REGULATOR'S INDIGENOUS ADVISORY COMMITTEE

- Contribute strategic advice and perspective on how the CER can make meaningful progress toward reconciliation in Canada
- Promote opportunities for systemic change through building and strengthening new relationships with the CER's board of directors and staff
- Leverage their experience with the energy or natural resource sector in providing advice
- Share Indigenous values and teachings as a respected voice of their communities, and integrate Indigenous perspectives into the CER's strategies, plans and actions

Source: Department of Justice Canada

the CER is going," says Stoll. "You will see better applications and evidence coming forth demonstrating Indigenous involvement as an integral component of the design and development of major projects and infrastructure at the onset, rather than a stakeholder engagement requirement completed for regulatory applications."

In the short term, he says, it may be harder to get projects approved "as people try to understand the boundaries of what is acceptable." In the longer term, though, the "new norm" established by the CER and its Indigenous Advisory Committee "will likely mean shorter approval processes . . . with better acceptance and, therefore, less uncertainty," he adds.

Oleniuk isn't anticipating specific changes to regulatory processes. Instead, "the changes that energy and infrastructure developers in Canada are mostly going to be experiencing are how their processes will be changed to incorporate UNDRIP," including the permitting and tribunal processes.

"The position of many First Nations is that they have been doing almost all the compromising . . . and would now like the Crown and proponents to start doing compromising themselves."

Matt McPherson, Olthuis Kleer Townshend LLP

The implementation of UNDRIP across Canada

The UN adopted the UNDRIP in 2007, with 143 member states voting in favour of it. The Canadian government introduced Bill C-15 on Dec. 3, 2020, as the first step in adopting it.

If the government passes the bill, it would require the Government of Canada, in consultation and co-operation with Indigenous peoples, to take all necessary measures to ensure that Canada's laws are consistent with Indigenous peoples' rights set out in UNDRIP. The bill would also require the government to develop an action plan to achieve its objectives. British Columbia became the first (and to date only) jurisdiction in Canada to implement UNDRIP — which the Truth and Reconciliation Commission has confirmed as the framework for reconciliation — in passing the B.C. Declaration on the Rights of Indigenous Peoples Act in November 2019.

Some concern lingers over the practicalities of implementing UNDRIP across Canada from coast to coast to coast. Thomas Isaac, a partner at Cassels Brock & Blackwell LLP in Vancouver specializing in Aboriginal law, says UNDRIP contains approximately 74 paragraphs that do not align with Canadian law. He also points out that UNDRIP doesn't contain any term around Aboriginal title and

that that concept doesn't exist in UNDRIP.

"Ownership over land does, and the right to get the land back if it was part of your traditional territory, [but] that doesn't align with Canadian law where you have to prove title. So, how are we going to make every law consistent with that?" asks Isaac.

UNDRIP includes the concept of free, prior and informed consent by First Nations affected by a nation's laws and administrative measures. Isaac says the B.C. government's definition of consent in UNDRIP doesn't align with the common understanding of consent.

Questions have also been raised over whether UNDRIP would give Indigenous peoples — First Nations, Inuit and Métis — the right to veto energy and infrastructure projects. McPherson calls this idea "a straw man."

A veto does not mean that one side "can unilaterally, without reason, say no to things," he says. "Consent is about process and means you are informed and are able to consent to something happening.

"Part of what underpins that idea is that First Nations governments are inherently more unreasonable than provincial, federal or municipal governments," he continues. Indigenous peoples must also follow the principles of administrative law and cannot withhold consent unreasonably, "so the idea that it's a straight-up veto . . . is just not accurate. First Nations aren't able to say no in any circumstance."

The Supreme Court of Canada has articulated the need for both parties to come to the table from a reasonableness position, he says, in *Mikisew Cree First Nation v. Canada* and *Haida Nation v. British Columbia*.

But "there needs to be actual compromise, and that in my view is something that's frequently missing," he says. "The position of many First Nations is that they have been doing almost all the compromising for 150 years plus and would now like the Crown and proponents to start doing compromising themselves." CL

Where there's a will, there's a way

Trusts and estates lawyers are dealing with the challenges of witnessing wills during a pandemic, writes **Zena Olijnyk**

FOR MOST lawyers, the move to a world of more electronic documents and less paper, along with Zoom or FaceTime calls, has been a godsend. Not for everything, mind you, but when the circumstances make sense, especially with a pandemic still raging, doing things virtually can be faster, cheaper and safer.

But for those who practise trusts and estates law, the virtual shift isn't so simple. Given the ways the laws work in this area of practice, there is still a reliance on paper and witnesses who are traditionally supposed to be physically in the same room and probably should not be a member of the client's family, especially if they are beneficiaries.

Then, many of the clients that trusts and estates lawyers deal with are often older, frailer and, given COVID-19, more fearful of leaving the safety of their home. For those clients in long-term-care facilities, there is also the issue of lawyers not being able to visit them in person because of lockdown and social distancing requirements.

Finally, there's the issue of determining someone's capacity or being unduly influenced by a person in the same room as the client but can't be seen on the computer screen during a Zoom call.

"The biggest change has been the use of modern technology in our practice," says

Salvatore (Sam) Amelio, a partner at MLT Aikins LLP in Edmonton. "Obviously, the efficiencies it has allowed have increased because I can meet with clients, wherever they are in the world, to discuss their will or estate. But my job still is not done because I can write the best will ever, but I also have a legal requirement to make sure that it is properly executed."

He says his firm came up with some creative solutions early on in the pandemic to in-person witnessings, such as "drive-thru" or in-person signings whereby the signature is witnessed through a car, glass door or window.

"I find the requirement that we determine the person's capacity could be a potential challenge if it is being done online."

Lori Duffy, WeirFoulds LLP

Lori Duffy, a partner at WeirFoulds LLP in Toronto, says, "challenging is the only word I can use to describe what it's been like over the past year." She adds that many of her clients don't understand why they can't just sign their documents, why two independent witnesses are needed and why there is a requirement, at least until relatively recently, for "wet" signatures on paper rather than electronic signatures. One of Duffy's solutions in the early days was to have her daughter filling in as one of the required independent witnesses since she was close at hand.

Ingrid Tsui, a partner at Alexander Holburn Beaudin + Lang LLP in Vancouver,

TRUSTS AND ESTATES

WILL-WITNESSING RULES: WEST

British Columbia: Changes have been made to the Wills, Estates and Succession Act to accept electronic wills and permanently permit the remote witnessing of wills.

Alberta: Remote Signing and Witnessing Regulation allows a will to be signed and witnessed remotely until Aug. 15, 2022.

Saskatchewan: The Wills (Public Emergencies) Regulations permits the signing of a will to be witnessed remotely as long as one of the two witnesses is a lawyer. Wills must be in writing and signed by the person making the will and both witnesses in ink.

Manitoba: The requirements for in-person commissioning and witnessing of wills and attorney powers have been suspended temporarily during the pandemic.

Ontario: During the COVID-19 emergency, a testator or witnesses use audio-visual communication technology provided that the communication is in real time and at least one person who is providing services as a witness is a licensee within the meaning of the Law Society Act.

"I can write the best will ever, but I also have a legal requirement to make sure that it is properly executed."

Salvatore Amelio, MLT Aikins LLP

describes her method for figuring out how to get signatures on paper will documents. "We didn't want to be going back and forth to so many people's homes, so we set up a table in one of my colleague's carport, and we would schedule at a time and day to have the client come down, and we'd be there to have the documents witnessed in person."

Tsui also tells the story of two of her colleagues who were willing to go to hospitals for a will signing, sympathetic to the client's situation. "Two days after witnessing the will, they got a call saying the client had tested positive for COVID-19, so they had to go into isolation."

These stories come from the early days, with most provinces — B.C., Alberta and Ontario included — now allowing for the electronic witnessing of wills.

In Alberta, for the pandemic's duration, requirements for witnesses to be "present" during the signing of estate planning documents will include those who are "present" via videoconference. However, virtual witnessing is only permitted if an active Alberta lawyer provides legal advice. Additionally, all parties must be able to see, hear and communicate with each other in real time.

In Ontario, an emergency order is in effect to permit the virtual witnessing of wills and powers of attorney over audio-visual communication technology. If the will is witnessed virtually, one of the witnesses must be a licensee of the Law Society of Ontario at the signing time. If neither witness is a licensee of the LSO or a virtual witnessing is not possible, the testator will need two individuals who are not beneficiaries of the will to witness the will in their physical presence.

In B.C., allowing virtual witnessing

has gone a step further, with the government changing the laws to make electronic witnessing permanent.

Still, Tsui says, there are different signing rules for other documents. "There's one rule for a will, one rule for power of attorney [and] one rule for a representation agreement, which is a medical planning document," she says. "I make sure I have the orders for these rules with me all the time, just so I can keep it straight."

While these new rules have solved a big part of the challenges of witnessing rules, lawyers still feel they must be vigilant if they are not in the same room as the client.

"There is a requirement that lawyers be able to determine the capacity of a person, or whether they are being unduly influenced by someone — that's definitely harder to do when you're doing things online," says Duffy.

"At the end of the day, I'm definitely relying on the client or those with them to do the right things and follow the correct protocols."

Ingrid Tsui, Alexander Holburn Beaudin + Lang LLP

She adds that, "normally, when you're dealing with a client in person, you can watch their face for clues, get a sense of how the family functions." Even if a relative who is a beneficiary brings the client to the office, Duffy says she makes sure to talk to them in private, something she can't ensure if matters are being taken care of through Zoom calls.

There could also be a genuine need to have someone tech-savvy near the client to deal with any troubleshooting that's needed. "Some of my older clients certainly cannot master Zoom on their own," she says.

Amelio says that, on a practical basis, he understands that "there may be more people in a room than I'd like" when dealing with a sick or elderly client not adept at computer technology. However, he acknowledges that it makes his job more challenging to determine "undue influence" from someone if he is unsure who is with the client. So, he will often have a separate phone conversation with the client or ask questions to make sure he is comfortable with the situation.

Tsui says she follows similar practices, "but, at the end of the day, I'm definitely relying on the client or those with them to do the right things and follow the correct protocols."

Another factor that wills, trusts and estate lawyers face is determining someone's capacity to make a will. "I find the requirement that we determine the person's capacity could be a potential challenge if it is being done online," Duffy says, especially if it is a new client that she hasn't met in person before.

Duffy tells the story of one of her lawyer colleagues who sent her a video of an online call with a client, wanting her thoughts on his capacity. "He was clearly not well. He was dozing off in between, and he kept looking over to one side on the Zoom call." It is the type of situation, Duffy says, when some specific questions might have to be asked, such as "Who is with you? What are you looking at there?"

Tsui relates a similar story about a client with whom she was dealing early on in the pandemic, concerned about his capacity. "Right away, I was quite concerned. So, I put a note in my calendar telling me that as soon as the office reopens for her to come in," she says. "Fortunately, we were able to arrange that because you just can't beat an in-person meeting." CL

WILL-WITNESSING RULES: EAST

Quebec: During the pandemic, wills and powers of attorney witnessing can involve technology. A lawyer or notary must be present virtually, and witnesses must provide two identification pieces, with one containing a photo.

New Brunswick: The Law Society of New Brunswick has published directives for remote execution and witnessing of wills and powers of attorney, which will be permitted until Dec. 31, 2022.

Newfoundland and Labrador: The Temporary Alternate Witnessing of Documents Act allows for the signing and witnessing of wills through audio-visual technology until "the date the public emergency ends."

Prince Edward Island: No specific regulations are in place, but PEI has been looking at recent moves to allow virtual witnessing of wills and powers of attorney

Nova Scotia: No specific legislation allows for remote witnessing, but the Nova Scotia Bar Association says that, as a last resort, videoconferencing can be employed, although capacity and undue influence to duress or influence need to be assessed.

Strengthen your leadership team

Being an effective leader is one of the hardest challenges to achieve in the workplace. **Lisa Stephenson** outlines six ways to ensure that leadership teams are set up for success

WE ALL know the right language when it comes to leadership and high-performing teams. No one would argue that leadership teams across all industries need vision, innovation and an ability to adapt constantly. Our expectations of our leaders have never been higher than they are today.

When you take individuals and ask them to be a team of leaders that can inspire and achieve results, you are handing them a collective mammoth challenge. Here are six strategies you can use to strengthen your leadership team.

1 Make the development of your leadership team an important project

Investing in your leadership team is the most important investment you will make. Think of their learning like you would a critical project for the business. Set deadlines and consult experts who will support their success. Create a vision for success, identify blockers and review their progress. Fill their toolboxes with support and hold them accountable to their roles.

2 Ask your leaders to do what others aren't prepared to do

The world is full of leaders who start out with great intentions — but intention isn't the same as results, and it doesn't guarantee great people leadership. Successful leaders do what's required. They keep going even when it's hard and they don't want to. They don't wait and they don't give in. They are resilient and emotionally healthy when it's really needed.

3 Create a sense of 'tribe'

A "we're all in this together" attitude can be the single most important ingredient to team success. Leaders who have each other covered and can speak the truth to those around them have the greatest opportunity for building trust. When leaders feel that they're part of something bigger than themselves, they are more likely to tap into their own potential and be brave in their decisions. They will challenge each other and celebrate each other.

4 Get them uncomfortable

It's true that the greatest learning happens in discomfort. For your leadership team to know what they're really capable of, you have to test their resilience and capacity. Given permission to play big and take calculated risks, they will grow their relationships with each other and learn from their mistakes.

This is where their potential sits as a team. Create opportunities and environments where they won't know the answers and might get it wrong. Magic happens when leadership teams get space to do this.

5 Pay attention to what they're doing, saying and feeling

Your leaders will be constantly receiving feedback from everyone, from their direct reports to shareholders. Leaders need leaders! They need senior people who care about what's happening to them. They need a safe and robust place to push back and share the experiences they're having. They need to know that they can ask for help and that all emotions have a place.

5 Honour the future version of your leaders

Imagine your leaders in two years' time. How much more will they know? Consider what you would put in place for your leadership team if they had already proved themselves. If they were smarter/wiser/more experienced leaders, is it likely they would have more responsibility and be assured of a seat at the table when it counts? When leaders feel like they are trusted, they can expend their energy on the people, processes and problems that really need their attention.

The reality is that it's unlikely that anyone else can create success for your leadership team. They are going to have to work hard and get on the ride.

I've never seen a team that was an overnight success. Recognize and value their commitment and courage, as these two attributes will be the foundation you want them to lean into. CL

> "When leaders feel that they're part of something bigger than themselves, they are more likely to tap into their own potential and be brave in their decisions"

Lisa Stephenson is the founder of the consulting firm Who Am I Projects and the author of Read Me First. She draws on decades of experience as a global speaker, leadership consultant and success coach and has worked with some of the biggest global names, CEOs, elite athletes and entrepreneurs.

The top 5 challenges for small businesses

Small businesses tend to have a high rate of failure — and it usually comes down to a handful of challenges. **Anastasia Massouras** explains how to overcome five common obstacles

REMEMBER THOSE feelings of excitement, achievement and growth when you first started your business? Now it's likely they have become buried among feelings of isolation, fatigue and ongoing financial stress.

Statistics from the Canadian government show that 97.9% of Canada's economy is made up of small business with fewer than 100 employees. Yet around a third of these businesses fail within their first five years, and the odds are stacked against those that continue.

This is a real issue and something that only can be addressed when business owners know what is stacked against them. Here are five key challenges for small business owners and advice for how to overcome them.

1 Working long hours

Running your own small business is a 24/7 activity, which is why it's so easy to get stuck on the treadmill. There is always more to do, always another form to fill out, another

client to call — always more, more, more. This impacts our home life, especially when we have to tell our partner why we won't make it back for dinner or to kiss the kids good night again.

It's easy to forget that we actually achieve more when we do less. Slowing down, carving out space and time for ourselves and what we enjoy and creating distance from our work helps with perspective. When we have a clearer head, when we're not trying so hard, then we create the mental space to solve complex problems and to respond to events instead of reacting to them.

2 Struggling with finances

Ask any business owner what their biggest stressor is and the majority will say money. As the leader of your company, it's impossible to have all the answers for all the problems, which is why the right support and education is key. Identifying areas for growth, then connecting with the right professionals to fill those gaps, will accelerate your success and make you feel supported and confident.

Ask yourself: Who is my tribe (personal and professional), and who will support me to get there? What other education, tools or resources do I need? Who can mentor me from where I am now to where I need to be? Take steps to address those gaps.

3 Managing staff issues

When you first started your business, it was probably pretty easy. The only person you had to manage was you. Now, 90 per cent of your time is likely spent managing the everyday challenges that your team brings into the workplace.

It seems counterintuitive, but you can't manage anyone else unless you're managing yourself first. When you don't feel safe, neither do your staff members. They are not immune to the fallout from your insecurity, stress and changes. You need to take them along on the journey with you, to connect with them and to keep them aligned with your vision and mission. Managing this issue starts with managing yourself.

It seems counterintuitive, but you can't manage anyone else unless you're managing yourself first. Your staff is not immune to the fallout from your insecurity, stress and changes

4 Maintaining health and well-being

Research shows that 20% of Canadians suffer from mental illness annually, and evidence suggests that psychological distress is most acute for sole traders. This is cause for real concern.

There will always be pressure, setbacks and failures running your own show — it will never go away. This is why it's crucial to be mentally healthy, fit and strong.

Making conscious choices each day about what to eat, when to exercise and how to switch off from work and on for home is the recipe for success and stamina in small business. Practising gratitude, meditating, walking in nature and being mindful of your thoughts, feeling and experiences are all ways to interrupt negative patterns and influence positive ones.

5 Asking for help

While you might have people around you all the time, it's easy to feel like no one truly gets it. So, instead of confiding in those closest to you about your challenges, you isolate yourself more and more. This only exacerbates what you are experiencing as you internalize what is happening.

Your mindset plays a huge role in changing this situation. It helps you move from talking about what you wish for to actually taking steps and asking for the help that will make a difference to your life.

Extending your hand for help is the biggest step toward gaining a sense of control over your environment. Knowing you can change yourself, your business and your life is crucial not just to survive but to thrive. CL

Anastasia Massouras is the CEO of Work Happy, which provides well-being and employee assistance programs and tailored advice for companies. She is also the founder and CEO of Pure Insights, a consultancy specializing in mental health intervention. For more information, visit anastasiamassouras.com.

The challenge of organizational leadership

Organizational leadership is harder than ever before, writes **John Eades**, but the right mindset and behaviours will allow leaders to meet this challenge

LEADERSHIP IS struggling in organizations — and that might be an understatement. The disengagement rate of employees is at an all-time high. The current failure rate for a new leader in an organization is 60%, and 71% of organizations don't feel their leaders can lead them into the future.

Taking these facts into consideration, along with all the time I have spent studying leaders, I believe the best leaders have never been better. I don't know if there has ever been a time in history with more self-aware, hungry and motivated leaders who believe it's their purpose to make a difference in the lives of other people — what we call "welder leaders."

What this has caused is a growing divide between leaders and non-leaders, not the other way around. A larger number of people go to work every day thinking about what their people owe them versus what they can give their people. The reason for this is simple: If it were easy, everyone would do it.

Soon after a high performer is put into a position of being responsible for other people, the reality sets in that it's not easy. It's hard because no longer do you get to think about yourself all the time — you are required to think about others and what's in their best interest before your own. Here are a few reasons why leadership is harder than ever before.

Higher expectations

People are no longer satisfied or willing to put up with average to below average leadership. Thanks to websites like Glassdoor, social media posts and "best places to work" lists, people know there are great companies and great leadership in the workplace.

There are two caveats here. First, people often feel they are stuck in jobs with poor leadership because of what they are being paid. They have built their lives around the salary they make, and taking the risk to change or explore isn't something worth changing. The second caveat is that average performers don't mind sticking around for poor leadership.

Generational differences

I hate the word "millennial." If I have to hear one more time how different they are, I'm going to lose it. If there's any generation that might be different by a large degree, it's gen Z, which is currently entering the workforce. Either way, these two generations (myself included) do desire things like praise, experiences, mentorship and the feeling of being invested in slightly more than previous generations. (These factors have always been important; they're just slightly more important today.) So, figuring out the right balance can be challenging.

Soon after a high performer is put into a position of being responsible for other people, the reality sets in that it's not easy. It's hard because no longer do you get to think about yourself all the time — you are required to think about others and what's in their best interest before your own

Growth, growth, growth

I hear the word "growth" over and over again from every single leader and company we work with. Why? Because whatever the current growth rate, it could always be better, and our investors, owners and highly driven people simply want more.

This makes leaders feel like they are being pulled in in two widely different directions. On one hand, there's the expectation of immediate results and the mindset of profit over people. On the other hand, there's the long game, where their primary focus is on the people they lead.

If this is a struggle for you, I loved the idea Marcel Schwantes shared on the "Follow My Lead" podcast about servant leadership: "There is nothing soft about serving and impacting others at work, because when you do, you get results."

Add all this up and it's simply true. Being a leader in today's work environment is harder than ever before, but that's the best part. With the right mindset, behaviours and long-term view on your career, you can become the leader people want to follow. When this begins to happen, your career will have purpose and meaning you have never ever felt before. CL

John Eades is the CEO of LearnLoft, a full-service organizational health company whose mission is to turn managers into leaders and create healthier places to work. He is a speaker, host of the Follow My Lead podcast, and author of F.M.L.: *Standing Out & Being a Leader* and the upcoming book *The Welder Leader*. For more, visit learnloft.com

OPINION

Imagine the future of law

The year is 2025. The legal system was transformed by COVID-19 and new law jobs in 2025 reflect that

"WE ARE NOT going back" is a common refrain from lawyers. But if we are not going back, where are we going?

This question is what many lawyers have on their minds as governments roll out vaccines. One year ago, if you told me that we would no longer need to use fax machines, we would file court documents online and all lawyers would be working from home, I would have said that's not possible. And yet, here we are.

The question for all of us is what happens next? Some say lawyers will go back to their offices and things will operate as they did pre-pandemic. But what about the massive changes to global business and the impact of digitization on the profession? How will this new cyber-efficiency influence future legal jobs? Consider three different kinds of lawyers in the year 2025:

1 Non-partner track associate. Meet John. He spends part of the year in Toronto and part of it working remotely from Florida to get out of the cold. John decided that working 80 hours a week at a law firm was not for him early in his work life. As a non-partner-track associate, John saw the benefit of working in a large firm with its infrastructure and its diversity of clients but wanted to have the flexibility to pursue his other passions.

After the pandemic, when it noticed an increase in employee happiness, the firm pursued a remote-first work environment, where working from home was the default. Office space remains for employees who need it. The firm has built up a robust remote working infrastructure. With this investment and commitment to maintaining a remote working culture, John has the flexibility to work wherever he wants.

2 Director of legal operations. Meet Sadia. Sadia works for a technology company where she manages and oversees its law department operations. She has as much seniority as her colleague, the general counsel, and together, they execute the legal strategic roadmap. Sadia also co-ordinates the department's legal technology roadmap and IT system implementations and optimizes the company's financial management, outside counsel and vendor management. In addition to a law degree, Sadia has a certificate in project management and a master's in data science.

Sadia is laser-focused on data and, as such, her team has developed key performance indicators to measure group performance. As the director of legal operations, Sadia has overseen the shift from a central repository of contracts to the deployment of a company-wide contract lifecycle management system. This CLM system assists with authoring, negotiations, approvals, storage, monitoring renewals and contracts compliance. The system has increased sales and decreased the cycle time from contract creation to implementation. Sadia's team reflects a new normal in the legal industry where lawyers work on multi-disciplinary teams with data scientists, technologists, law clerks and contract administrators.

3 ODR mediator. Meet Henry. Henry is an online dispute resolution mediator for the Ontario Small Claims Court. Court Online Dispute Resolution is a digital space where parties can resolve their disputes. This platform walks the parties through the mediation process and provides step-by-step instructions on uploading their documents and setting out their issues for the mediator. Once the parties complete these initial steps, the court assigns Henry to the case. He reviews the parties' uploaded materials and prepares a welcome message for the parties to introduce them to the mediation process. His message includes a reminder regarding the online etiquette and confidentiality of discussions. Henry then uses the messaging system and organizes Zoom meetings for the parties to start discussing settlement.

Although Henry would prefer to meet the parties face to face, the CODR system's improves access to justice; thus, its benefits outweigh a physical meeting's advantages.

The practice of law is changing. These post-pandemic positions are already emerging in the legal space, helped by a plethora of document and workflow automation. With this change and use of technology, data scientists and technically skilled people will need to supplement future legal teams. Lawyers will need a whole new set of skills for the future, and we need to determine how we can build those now.

The pandemic has been a rude awakening for some lawyers. Instead of waiting for the next disruptive legal moment, it may be time to embrace and build for the future law practice and legal jobs. CL

Monica Goyal is a lawyer, the director of legal innovation for Caravel Law, a part-time member of the Condominium Authority Tribunal and an instructor with the Institute of Future Law Practice.

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