

# Briefly!

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MAY 2016

## How to #AskChiefJudge Crabtree to Do a #Selfie

**S**kip the formalities! Forget the centuries of court decorum, the opportunity to engage Provincial Court of BC Chief Judge Crabtree was at hand. Last April 14, 2016 he hosted Canada's first Twitter Townhall using #AskChiefJudge as part of the Law Week 2016 celebration.

Armed with a few questions about court services like the First Nations Court as a problem solving court. It was also a rare opportunity to ask him directly for ways to make it easier for self-represented parties who have to appear before them, most notably the use of McKenzie Friends (MF).

In our Amici Curiae clinics, we have encouraged self-represented litigants to have a MF. SCBC Master Baker first brought the idea to my attention when we were preparing the *Guide to Civil Litigation for SRLs* a year ago.

This is what we say to SRLs: Think about bringing a friend with you. Sometimes having a friend with you can be helpful for both you and the Court if they are there to assist with the trial, but not there to testify for you. This friend is called a "MF". It means that the Court can allow a friend to sit with you, a self-represented litigant, for the main purpose of taking notes, helping to organize and produce documents, or the

like. They are NOT to speak for you or be your advocate. Sometimes a friend might have more objectivity because they are not involved in the dispute but can look at it from an outsider's point of view. A friend can help you understand what the Court is saying or recommending.

There is no formal Court application to have your friend there. Your friend first sits in the body of the audience. You have to ask the Court if your friend can sit with you as a MF and take notes, find papers, etc. The Judge or Master might not know the phrase, but as long as your friend is not intruding, the Court will likely permit it.

I asked Chief Crabtree on the need to first ask permission before an MF can sit beside the SRL, he responded by saying that judicial discretion in allowing MF is needed to balance the interests of all including ensuring that the MF plays a helpful role for the SRL & is qualified and capable of doing so.

And in our experience, being able to explain why the courts are conducted in a certain way is crucial to the SRL.

The Chief was generous enough to answer 13 of my questions. Somewhere along the many questions, I asked for a selfie. You all know

about the old adage: you can't get a court to do something unless you ask for it. Truth be told, I was not expecting him to do it.

Then towards the end of the session, this appeared:







Not bad, eh? But wait, we're not done yet.

Earlier this week I bumped into him as he was heading back to work, I thanked him for his graciousness. "I hope you are happy with the selfie that I took for you." he says.

I demurred, and said: "But I want a selfie with you Chief!"

Without missing a beat, he says: "Fine, I'm supposed to tour your Amici Curiae Temporary Foreign Worker Uncontested Divorce clinic soon. We'll do it then."

Ah, the shameless things I do for access to justice!!

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May 12  
May 13/14

May 17  
May 18

May 19  
May 19

May 26  
June 2

June 3  
June 4

June 10  
June 16

June 29  
June 30

July 12  
July 26

August 27

**Dodek: Civility in the Canadian Profession  
Civil Litigation 102**

**Aboriginals as SRLs**

**Civil Trial Preparation for Plaintiff Firms 101**

**Civil Trial Preparation for Defence Firms 101**

**Public Speaking Workshop for Support Staff**

**History and Legacy of the Residential Schools**

**Master MacNaughton: Family Law Pleadings**

**Business of Law 201**

**Family Law Series**

**Public Speaking Workshop for Support Staff**

**Judge McKenzie: Under The Robes**

**Diversity on the Bench Matters**

**Document Discovery (List of Documents) 101**

**List of Documents) 201**

**Transgender Clients as SRLs Part 1 #A2J**

**TRC Children of Denial**

**Master Dick Drafting F8 Affidavits**

**New: Job Posting Service**

# Special Lecture: Vivá la revolution?! Civility in the Canadian Legal Profession

May 12, 2016 Thursday 5:30 to 7:30pm

Venue: Justice Education Society  
Room 260 800 Hornby St or by web



Over the last fifteen years, the legal profession in Canada has been engaged in a sustained civility campaign. It has celebrated and elevated civility and prioritized it at the cost of other more important values and issues in the legal profession and in the administration of justice. This provocative lecture will explore and reveal the roots of the duty of civility for Canadian lawyers from the 19th century until modern day. Is the civility revolution over in Canada? *We'll see.*

Proceeds from these event help fund the Temporary Foreign Worker Uncontested Divorce clinic of the Amici Curiae Paralegal Programme.

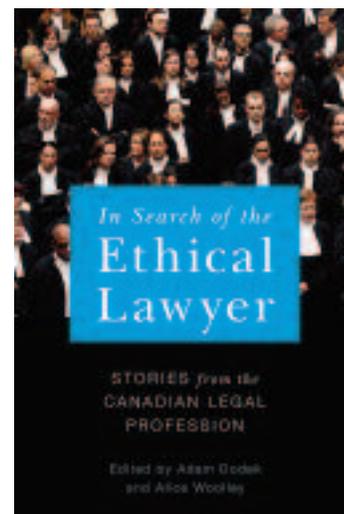
Fee: \$125.00 per person includes a signed copy of *In Search of the Ethical Lawyer*.

Venue: Justice Education Society Room 260 800 Hornby St.

May 12, 2016 Thursday 5:30 to 7:30pm

Venue: Justice Education Society Room 260 800 Hornby St or by web

CPD: 1.5 hours including 1.5 hour in client relations, ethics and professional responsibility.



**RATES:** (any materials will be provided electronically and taxes included) GST R128573300

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## Should a Person's Religion Affect Their Worth & Job Eligibility?

Should a person's religion affect their worth and eligibility for a job, especially when that job has no relation to religion? The BC Human Rights Tribunal did not think so. In its recently released decision, *Paquette v. Amaruk Wilderness* and another (No. 4), 2016 BCHRT 35, the Tribunal Member found in favour of Ms. Paquette, the complainant. Ms. Paquette alleged that the respondents discriminated against her in the area of employment on the basis of ancestry, religion and political belief.

The Tribunal Member found that Ms. Paquette was subjected to discrimination on the basis of religion. He did not find any evidence to support discrimination based on ancestry and declined to make any finding on the basis of political belief since there was no argument to the contrary before him.

The hearing of this matter was entirely one-sided as the respondents and their counsel left the hearing after berating the Tribunal on various issues, stating that the Tribunal was incompetent to hear the complaint. That left Ms. Paquette as the only witness. The hearing proceeded without the respondents.

Ms. Paquette was a devout Christian. She attended Trinity Western University ("TWU") and subscribed to its "Community Covenant" which in essence is a code of conduct that encourages behaviour that evangelical Christians believe is in accordance with biblical teaching and discourages behaviour that is not, which included homosexuality. The issue of TWU's Community Covenant ignited a national debate over discrimination and freedom of religion in the context of TWU's right to accreditation for its law schools.

This case does not involve a law school. It does not involve homosexuality, marriage or sex in general. It involves a job application for an assistant guide internship with a wilderness company.

Ms. Paquette had experience in river rafting and was certified in first aid. She answered an advertisement posted by Amaruk for a position as an assistant guide intern. She submitted her application by e-mail to Amaruk. She received an e-mail back from Amaruk indicating that she did not meet the minimum requirements and pointed out that

her faith in Christianity and her affiliation with TWU was an affront to their way of life. What followed was an exchange of e-mails that further offended her faith. Ms. Paquette testified that "[i]t didn't make sense – if you're not giving me a job why dump on my beliefs?".

Indeed, the rejection of Ms. Paquette's application did not stop there. Although Ms. Paquette had responded to the initial reply sent by Amaruk, she received three other unsolicited e-mails from Amaruk that included comments like, "In asking students to refrain from same sex relationships, Trinity Western University, and any person associated

with it, has engaged in discrimination, as well as intolerance...graduates from Trinity Western University are not welcome in our (Norwegian) company" and "God Bless' is very offensive to me, and yet another sign of your attempts to impose your religious views on me. I do not want to be blessed by some guy...whom (sic) has been the very reason for the most horrendous abuses and human rights violations in the history of the human race". !

This article concludes next month. *Sharon Allegrini heads AC's human rights clinic and is a paralegal at Bull, Houser & Tupper LLP.*

## View from the Bench: Family Law Developments (1/2)

(continued from page 2)  
intended to to keep property that was brought into a relationship separate for each party upon the breakdown of the relationship. However, any increase in the value of the excluded property is a family asset, and is to be shared equally upon the breakdown of the relationship.

What happens to excluded property when it is used to purchase jointly owned property? One case, *Remmem v. Remmem*, 2014 BCSC 1552, states that such property did not lose its excluded attributes when used jointly. Yet another case, *Wells v. Campbell*, 2015 BCSC 3, states that if property is purchased in joint names using

excluded property brought into the relationship, it is deemed to be a gift by the other spouse, and thus no exclusion existed (referring back to old common law principles). Currently the *V.J.F. v. S.K.W.* 2015 BCSC 593 case has been appealed to the BC Court of Appeal to determine how excluded property should be dealt with when it has been used jointly.

Finally, he mentioned that there have been two other recent decisions which discussed have come down on the side of the *Remmem* approach: *Andermatt v. Tahmasebpour*, 2015 BCSC 1127 and *P.G. v. D.G.* 2015 BCSC 1454. !

**Supple leather brief cases perfect for chambers, CPCs, TMCs or trials!**



## Dialogue Series May to August 2016

**D**ialogues (not lectures) are a better way to discern how we as stakeholders in law can be more inclusive towards First Nations and other cultures including gender variant people. Here are 3 events in BC that might be of interest to you. They are available in person or by web.

**Venue:** Justice Education Society Room 260 800 Hornby St.

**Fees:** Vary

### **TRC & Law 102: History and Legacy of the Residential Schools**

**May 26, 2016 Thursday 5:30 to 7:30pm**

Join Karen Joseph who will share her stories about the residential schools. As the eldest daughter of Chief Dr. Robert Joseph, Karen can speak first-hand to the impacts of inter-generational trauma and the current realities of the residential school legacy. In the true legacy of Kwakwaka'wakw traditions and culture, Karen holds a lifelong commitment to family and community.

Here is some of what she plans to lead a conversation on:

The TRC: a roadmap of the past, present and future

The *Indian Act* and systematic discrimination

Missing women, child welfare, education and the RCMP –Attawapiskat

Daniels decision – the jurisdictional gap

Lawyers – role in building understanding and bridges

We are all in this together – we are all one

CPD: 2.0 hours including 1.0 hour in client relations, ethics and professional responsibility.

### **Diversity Dialogues 108: Under the Robes Diversity on the Bench Matters**

**June 16, 2016 Thursday 5:30 to 7:30pm**

Join Judge Kael McKenzie – Provincial Court of Manitoba as he facilitates a conversation about diversity on the bench.

When I was appointed to the bench there was much said in the media about the fact that I am transgender. Many asked, “Why does this matter?” It is a valid question because justice is supposed to be blind and judges are supposed to be unbiased. In theory a Judge’s personal characteristics are irrelevant, but the reality is that we each bring our own unique experience and perspective to the difficult task of Judging especially with sensitive cases. Does or should the Judiciary reflect Canadian Society? What issues does diversity raise for the public? What if any barriers are there to judicial appointment? Who if anyone should be excluded?

CPD: 2.0 hours including 1.0 hour in client relations, ethics and professional responsibility.

### **TRC & Law Dialogues 103: Children of Denial (Musqueam Elder Grant)**

**July 26, 2016 Tuesday 5:30 to 7:30pm**

CPD: 2.0 hours including 1.0 hour in client relations, ethics and professional responsibility.

**Note:** Previous Diversity Dialogues are available for viewing. <http://tinyurl.com/lccdiversitydialogues>

**RATES:** (any materials will be provided electronically and taxes included) GST R128573300

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## Trial Preparation for Civil Plaintiff Firms 101

This is your best opportunity to learn about the Civil Rules of Court, including the changes effective July 1, 2016, as they apply to trial preparation. You will work with the different Forms and learn how they can impact your case. This course is a prerequisite to the intermediate level course. For those with trial experience, you will pick up new strategies and for those new to trial preparation, you will learn what must be done and when. *Attend in-person.*

## Trial Preparation for Civil Defence Firms 101

This course is a terrific opportunity to learn how to prepare for trial from the defence perspective. If you do plaintiff work, this is a course you must take. Learn to think how the other side thinks.

We will review the applicable Rules of Court including the changes for July 1, 2016 and the critical process of gathering documents. You will examine the special considerations concerning lay witnesses and expert evidence. You will gain insight about how to begin preparing your case from 18 months prior to trial and how to make the best use of your "BF" system. You will learn how to prepare your documents for trial - even for the most complex cases. As well, you will gain an understanding of different trial preparation strategies available through our court forms and Rules of Court. Finally, you will have an opportunity to apply these new concepts to a case study written specially for this course.

*You have a choice between attending in-person or by webinar.*

**Registration:** [WWW.LAWCOURTSCENTER.COM](http://WWW.LAWCOURTSCENTER.COM)

**Course Fees:** (course materials and GST 128573300 included)

<input type="checkbox"/> Single In-Person Seat	\$625
<input type="checkbox"/> Two Course Bundle or Multi-Seat In-Person Rate (you must register for each on the same day)	\$521.36
<input type="checkbox"/> Single Webinar Seat License	\$625
<input type="checkbox"/> Two Course Bundle or Multi-Seat Webinar Rate (you must register for each on the same day)	\$521.36
<input type="checkbox"/> Please send me a copy of the manual includes shipping and GST.	\$152.25
	1604 B!



## Civil Trial Preparation for Firms 101: Plaintiff and Defence

### Using Rule 7-1(1) to Avoid Nasty Surprises In Pre-trial Exams of Witnesses

**A**s we prepare for our civil trial preparation courses on May 18 for plaintiff & May 19 for defence, 2016 - We turned our attention to pre-trial examinations for witnesses. One of the most critical tasks in preparing for trial is determining the potential witnesses; which of them will bolster your case; and, the potential witnesses for the other side. (Note this article reflects the rules in effect for July 1, 2016.)

#### Lists of witnesses

There are many ways to obtain names of potential witnesses. If they have not been provided voluntarily, Rule 7-2(18) of the BC Supreme Court Rules provides discovery rights that you can use to get witness names. This rule provides that the person being examined must answer "any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and is compellable to give names and addresses of all people who might reasonably be expected to have knowledge relating to any matter in question in the action".

The lists are filed with the Trial Brief under Rule 12-2(3), at least 14 days and no more than 28 days before trial. These witness lists must indicate how much time will be needed for direct and cross-examination. By the date of the trial management conference, you will be aware of the experts who will be called for cross-examination and for direct examination (due to the notice provisions in Rule 7-4(1) and 12-2(3)).

#### Deposing witnesses

Once you have the names and addresses of the witnesses, you can use Rule 7-5(1) to compel potential expert witnesses to provide answers to relevant questions. Rule 7-5(1) provides that "where a person, not a party to an action, may have material evidence relating to a matter in question in the action, the court may order that the person be examined on oath on the matters in question in the action and may, either before or after the examination, order that the examining party pay reasonable solicitor's costs of the person relating to the application and the examination".

#### Experts may be exempt

The case law is unsettled but, on the grounds of privilege, opposing counsel probably does not have to disclose the names of the experts they have retained. Under Rule 7-5(2) an expert is exempt from being called for deposition unless there is no other way to obtain the facts in their knowledge. If the person is not an expert, your affidavit need not address the issue of whether or not you can obtain the information in another way. This relief is additional to and not in place of your right to cross-examine a party on an affidavit under Rule 7-5(1).

#### Evidentiary burden

Rule 7-5(3) governs the evidentiary requirements for a Rule 7-5(3) application. This application is governed by Rule 8-1. Your affidavit in support of the application must set out as:

- specific issue to which the applicants believe the evidence will be material; and
- refusal or neglect of the proposed witness to give a responsive statement, either orally or in writing, or witness has given conflicting statements.

To develop the Rule 7-5(3) application, send the proposed witness a letter setting out each question requiring an answer. If you can get the answers in writing, this is best. Make sure you ask all ancillary questions in the initial letter because follow up questions are not allowed. If the witness' answers do not conflict with earlier statements, the witness has complied with the Rule and the matter ends there. The answers provided are used to determine whether:

- The witness should be called for your client at trial.
- The witness is likely to be called by the other side for trial.
- The witness' testimony at trial can be impeached.

If the proposed witness does not comply, then a Rule 7-5(3)(4)(5) application for a deposition is warranted. The evidentiary burden is high, so it is critical that the initial letter be clear and concise and set out the questions precisely, including any additional questions that might arise from the answers. When drafting the material, make sure to review the potential answers to each question and provide follow-up questions.

#### Service of notices

It is also important to provide in the letter a time limit for the witness' response (usually 14 days). Serve the letter in a way that you can prove that the witness received it. Courier or registered mail is the best. Only by establishing a time limit and proper service can you establish that the witness has failed to answer the questions as set out. Also, in the letter, mention the potential remedy of a court application so the proposed witness is aware of it. The vast majority of them comply and the application is seldom needed.

You must serve notice, under Rule 7-5(4), on the witness at least 7 days before the application will be heard. Usually, the witness is the only person with standing to object. Once you have an order granting the deposition, you must remember to notify all parties of the deposition by serving a copy of the subpoena under Rule 7-5(5) no less than 7 days before the examination.

**Be clear** Proper drafting of questions and use of Rule 7-5 will certainly mean fewer nasty surprises at trial! !



## View from the Bench: Developments in Family Law (1/2)

As Amici Curiae begins its expansion to provide court form help for family law self-represented litigants, a number of seminars have been arranged for this summer (see page 1). As part of our preparation, here is a summary of the remarks SCBC Justice Butler at the 2015 paralegal conference. He is the Chair of the Family Law Committee of the Family Law Project, an internal court project for Vancouver and New Westminster.

Several general comments were made on the role of judges and lawyers in increasing access to justice in the family law context. First, judges hear all types of cases, although prior to their appointment, not all judges have practiced in family law. There are eight judges appointed in Vancouver and four appointed in New Westminster on the rota to hear family law matters for six months at a time for Judicial Case Conference (“JCCs”), Chambers, Settlement Conferences, and trials. This gives them a concentrated time in which to deal with family law matters; thus improving access to justice with judges producing quicker decisions and having

greater consistency of the decisions.

Second, it appears that there are more and more self-represented litigants (“SRL”) in family law matters, especially those who come from the middle class. It is challenging for a judge to have a SRL when there is a lawyer on the other side. A lawyer not only has a duty to their client, but also a duty to the court. It is important that they present their case fairly and not take advantage of a SRL. The court greatly appreciates it when a lawyer provides an opposing party SRL with assistance, albeit not legal advice. Paralegals can assist by letting a SRL know what is expected in court and how to do it. Although a client may take exception to accommodating the opposing party SRL, the client should be told that the assistance provided will make the case proceed more smoothly, and provide increased access to justice.

Justice Butler also made several drafting points for pleadings in family law applications. First, it is important to distinguish and identify which statute one is relying upon. The *Family Law Act* (formerly the

*Family Relations Act*) is a provincial statute, while the *Divorce Act* (Canada) is a federal statute. It should be apparent in the pleadings, such as Notices of Family Claims, and Counterclaims, as well as in Notices of Applications and resulting orders, as to which statute you base your claim on, as there are overlapping provisions for matters relating to children and spouses. In particular, this is important in matters relating to mobility, varying support, and limitation periods. Some differences are small, and it may not be clear. In *Halliday v Halliday* 2015 BCCA 82, the court found provisions in both statutes to be similar but not identical, and recognized the importance to make the distinction.

It is also important in Notices of Applications that the legal basis set out for the relief sought is more than one line. Otherwise, the court may find there is not sufficient notice provided for in the legal basis, and the application may be denied. In order to assist with the consistency of drafting orders, in the future there may be a “Pick List” setting out various standard terms and/or wording for orders made at JCCs. It is also important to note there is a new form to be used when drafting JCC Orders. (Master MacNaughton June 2 seminar: Family Law Pleadings will address the pick list.)

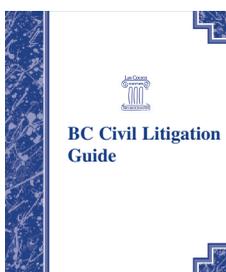
In addition, F8 Financial Statements must be filed well in advance of a JCC. The F8 sets out incomes, assets and

debts, and is required for JCCs. It is also important to realize that F8s are sworn statements, and must be updated to ensure the information relied upon is current. Do not ignore or treat these documents casually, and be sure to utilize the beginning to include where your client may anticipate any changes. (A seminar on how to draft F8s will be held on August 27.)

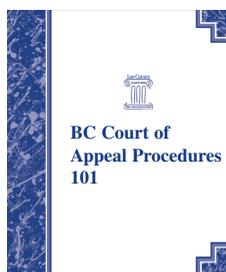
Justice Butler also commented on recent developments in BC family law. He noted that the matter of non-disclosure in family law actions has been a long ongoing problem. Sections 212 and 213 of the *Family Law Act* now provide relief for non-disclosure. The penalties range from fines up to \$5,000, security, and costs, as well as allowing the court to make adverse inferences as to a party’s income for support purposes.

More interestingly, the term of “excluded property” is new under the *Family Law Act* (“FLA”), and its treatment is still evolving. In prior actions commenced under the *Family Relations Act* with claims for property division, anything used for a family purpose was deemed family property. Under the FLA all property at the time of separation is a family asset, however, excluded property is not. An example of excluded property is property acquired by a spouse prior to the relationship and inheritances, among other property. The legislation is

(continued to page 2)



**BC Civil Litigation  
Guide \$500.00**



**BC Court of Appeal  
Procedures 101 \$152.25**

# Family Law Series Summer 2016

In-person or by webcast

**Advice to and From the Trenches** (Fee \$210)

**June 2, 2016 Thursday 4:30 to 6:30pm** (We may run past the end time, depending on Q/A)

Lecturer: Master Heather MacNaughton, Supreme Court of BC

Learn about what to look and ask for in a family proceeding from start to finish. She will then go through the new Notice of Family Claim form and the various orders that might be sought with the pick list of orders informing the pleadings from the outset. Note: new rules in effect for July 1, 2016.

CPD: 2 hours including 0 hours in client relations, ethics and professional responsibility.

**Family Law Series** (Fee \$750)

**June 4 to July 26, 2016 Saturdays 10am to 1:30pm**

A four part series that covers preparing for a family trial when at least one party is self-represented from the start to finish in both the Provincial and Supreme Court of British Columbia.

Faculty: Judge P Bond, Judge J Groves, Jennifer Lin & Jennifer Muller,

1. June 4, 2016 - Life Cycle of a Family File

Learn each step of a Provincial Court and Supreme Court file, from the originating pleading to trial, as well as specific explanation of what happens at a JCC (in SCBC) and at a FCC (in PCBC) and how to prepare for them.

2 June 11, 2016 - Drafting Pleadings Generally

Learn how to draft originating pleadings (Notice of Family Claims, Counterclaims, Responses, Application to Obtain an Order), as well as JCC briefs, trial briefs, notices of motion. If time allows, how to draft specific documents for trial.

3 June 25, 2016 - Preparing for Chambers

Learn how to draft Notices of Application, Affidavits (further detail on affidavits to be provided at the next session) and Application Record. You will also learn about the procedure of a chambers application, from setting down the application to the procedure on the day of the application, and general tips on what to do and what not to do.

4 July 16, 2016 - Drafting Affidavits & F8s

Learn how to organize and draft effective affidavits and F8 financial statements.

CPD: 12 hours including 0 hours in client relations, ethics and professional responsibility.

**Drafting F8 Financial Statement Affidavit Seminar** (Fee \$175)

**August 27, 2016 Saturday 9am to 1:30pm**

A seminar on a crucial affidavit the F8 Financial Statement: how to draft it with an access to justice lens. Faculty: Master Sandra Dick, Bencher Nancy Merrill, QC, Taruna Arora, Jennifer Muller.

**RATES:** (any materials will be provided electronically and taxes included) GST R128573300

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## Civil Litigation 102

This two day program is designed for juniors to gain an understanding of the civil litigation process and its Rules. At the end of their studies, the attendees will be able to put the theory into practice and they will have the tools to successfully assist in a civil litigation file from start to finish.

*“The explanations made a difference.  
It is easier to have someone with  
so much experience lay it all out rather  
than just reading the Rules.”*

### COURSE PREREQUISITE

*There is pre-course work that will be assigned.*

### COURSE REPORTING FOR CPD

*For those with CPD requirements, this course is 14.0 hours long with 1 hour devoted to ethics, professional responsibility, ethics, client care and relations. If you meet 70% of the course expectations, a **Certificate of Completion** is issued to you.*

**LOCATION** Law Courts Center CPD Room 840 Howe St #150 Vancouver BC

**INSTRUCTOR** Yvonne Choi, Legal Assistant, *Harris & Company LLP*

**RESERVATIONS** Please complete the form below and return to: **Law Courts Center**, Legal Education Program, 150 - 840 Howe Street, Vancouver, BC V6Z 2L2. Make cheques payable to Law Courts Center.

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**For junior lawyers, solos,  
paralegals and legal secretaries!**



*“Let me show you  
how the different  
parts of civil  
litigation are  
connected!”*

### Course Fees: (course materials and GST included)

- Single Seat	\$924.00
- Multi-seat & Accredited Group Rate (Amici Curiae)	\$872.55
- Please send me a copy of the manual only as I am not able to attend.	\$152.25

### Registration:

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150-840 Howe Street, Vancouver, BC Canada V6Z 2L2



## Litigation Privilege: Why *Cliff v Dahl* Still Matters

To people new to litigation, it is important to understand why certain things are done. Or not done. We will be discussing key topics like litigation privilege in our two day course on Civil Litigation 102 course on April 15/16.

In *Cliff v. Dahl*, 2012 BCSC 364, the Court was primarily concerned about the production of litigation-privileged documents. The defendants and third parties, Mr. Weaver and Mr. Jones, made an application for production of statements they provided to an investigator employed by the plaintiff, Mr. Cliff. These included any drafts of the statement, the audio recording of the statement given during an interview, and any transcript of the audio taped interview. Mr. Cliff opposed the order sought on the ground that the statements are protected by litigation privilege.

As a background, the case arose out of a motor vehicle accident on January 21, 2007, when Ms. Dahl's vehicle struck a pedestrian, Mr. Cliff. The third parties, Mr. Weaver, Mr. Unger, and Mr. Jones were present at the scene of the accident and were the owners or operators of the disabled vehicles.

In March 2007, Messrs. Weaver, Jones, and Unger provided an investigator hired by Mr. Cliff's counsel with an audio-recorded statement with respect to his recollection of the accident, along with a signed statement of their accounts of the accident. They were not provided with a copy of their statements or their recordings.

Previously, in February 2007, Ms. McAuley, an investigator hired by ICBC, contacted Messrs. Weaver, Jones, and Unger to obtain statements from them regarding the accident. At this time all three individuals were only witnesses to the accident, and later, all three merely agreed to provide her with a copy of the statement they had provided to Mr. Cliff's investigator. However, only Mr. Weaver provided her with an authorization to release the document. Ms. McAuley made several attempts to obtain Mr. Weaver's statement from Mr. Cliff's counsel; however, she received no response to her communications.

On October 23, 2009, before Mr. Weaver, Mr. Unger and Mr. Jones joined as third parties, Ms. Dahl brought an application for production of the statements they provided to Mr. Cliff's investigator. Master Baker dismissed Ms. Dahl's application on the ground that the documents were covered

by litigation privilege; that is, the dominant purpose for their creation was in aid of the conduct of litigation and to obtain legal advice: *Cliff v. Dahl*, 2009 BCSC 1947. Ms. Dahl appealed this decision and the appeal was dismissed: *Cliff v. Dahl*, 2010 BCSC 1998.

Accordingly, this case contemplated two main issues; firstly, whether the subject matter of Ms. Dahl's application is res judicata, and secondly, whether Mr. Cliff should be ordered to produce the statements of Mr. Weaver and Mr. Jones because these applicants are now parties to the action. Here, Madam Justice Bruce ruled that the question of whether the statements of Mr. Weaver and Mr. Jones were governed by litigation privilege at the time they were created is res judicata because there is a material difference between production of statements made by a witness and production of statements made by a party who is adverse in interest.

The Court's analysis of the second issue relied heavily on *Flack v. Pacific Press*, (1970), 74 W.W.R. 275 (B.C.C.A.), which stands for the proposition that a statement made by one party to an agent of another party, who is adverse in interest, is not privileged and must be produced upon demand to the maker of the statement. Moreover, it is irrelevant whether the statement is made either before litigation has commenced or at a time when the person is a witness rather than a party to the action. The court emphasized that privilege over a document may be lost by a change in status from witness to party adverse in interest. Accordingly, where a witness is subsequently joined as a party, a statement made by that witness to a party now adverse in interest is no longer privileged.

Consequently, the Court ordered Mr. Cliff to produce to the applicants the audio recordings and signed statements that were provided to Mr. Cliff's investigator within 14 days of this order and upon payment of the reasonable costs for production of these copies. In coming to its conclusion, the Court noted that the authorities cited by the applicants that followed *Flack* have specifically applied its ratio to situations where the privilege claimed is litigation privilege rather than privilege related to confidential solicitor-client communications. Accordingly, the Court reiterated the distinction that whereas witnesses would not be normally compellable due to litigation privilege, the change in their status to parties adverse in interest to Mr. Cliff opens the door to disclosure. !



## Drafting Affidavits For Women Who Experienced Violence

In trying to learn what access to justice difficulties do women from the downtown eastside have. Amber Prince, counsel for the Atira Women's Resource Society, posited that they are pathologized as difficult. Last, March 8, 2016, she returned to train Amici Curiae on affidavit writing.

Simply put, the purpose of an affidavit is to prove something to get a remedy from a Court or Tribunal. The definition of affidavit is "a written statement confirmed by oath or affirmation, for use as evidence in court."

It is important for us to remember that the facts of what actually happens to a woman impacts how she presents those facts. She may be dealing with racism, effects of colonialism, poverty, violence, a lack of family support, parenting responsibilities and/or health issues which may cause her to be mistrustful, have difficulty keeping appointments, to be angry or upset. This in turn can affect how we and others perceive her story. But it is her story that we are trying to convey to the Court or Tribunal. Often women from the Downtown Eastside are perceived as "difficult". Just because a woman is presenting her story in a difficult way doesn't mean she's not oppressed or doesn't have a real legal issue. It is a struggle for most of these women to even have an opportunity to tell their stories. Our job is

to move past how the client presents and get to the legal issues.

How can we do this? By non-judgmental and active listening, we can facilitate a client to explain her problems and concerns. She is an expert on her own life. Then, after fully hearing the client, we can consider the legal issues and options and prod for further details and information. In doing so, we should consider potential sources for further information and/or exhibits, such as healthcare providers, witnesses, bank records, photographs, emails, text messages and government records. It is helpful when requesting further information and documents to provide labelled folders for the client to assist her in gathering and organizing the information.

As with drafting any affidavit, the usual tips apply. Use plain language the affiant would use and avoid argument, opinion, speculation and double hearsay. In the case of applications for most interim orders, affidavits on information and belief are acceptable. However, be sure to indicate the source of the information. Typically, affidavits should be organized chronologically and if they are lengthy, headings can be helpful. Ensure the affidavit only contains relevant evidence. Of course, what is relevant will depend on the type of proceeding and application. Duty counsel is

available to provide assistance in this regard. In addition, there are many resources online with good information on drafting affidavits. Some of them include:

The Family Law Legal Services Society:  
www.familylaw.lss.bc.ca

Clicklaw Wikibooks:  
wiki.clicklaw.bc.ca

Law Society of BC:  
lawsociety.bc.ca

Once the affidavit has been drafted and the exhibits prepared, the affiant should have an opportunity to read it and review the exhibits to ensure it is all accurate to the best of their knowledge.

Lastly, the *BC Code of Professional Conduct* sets out important rules for lawyers when commissioning affidavits. The lawyer must ensure the client is physically present, acknowledges that she is the affiant and understands or appears to understand the significance of the oath or declaration she is making. Unless the affiant is known to the lawyer, the lawyer should request government identification from the affiant. If the client does not have identification, appropriate introductions can be made by a support worker or nurse who knows the client. The affidavit must be sworn or affirmed in the lawyer's presence and fully signed by both the lawyer and the client.



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I like to remind our volunteers that we are asking judges and masters to rely on that one sheet of paper – the affidavit, to believe what the affiant is saying. We need to be able to bring compassion to our work and we need do a good job of bringing the relevant information to life.

*Dom Bautista thanks Christine Millar for her help in writing this article. She is an Amici Curiae volunteer and a paralegal at Harris & Company.*

## Business of Law Workshop 201 Moving Beyond the Standard Reports

**F**inancial reports measure behaviour from how well someone tracks and bills for their time to how well they use their support staff to satisfy the firm's clients. You can learn more about your firm not only by taking a close look at the standard reports but by massaging the numbers to flesh out what is or is not taking place in your firm. We will show you how using three case studies we developed just for this workshop.

### At the end of your studies, you will be able to have:

1. Explain how effective tracking of billable time can affect profitability;
2. Explain how labour costs can impact human resource decision making;
3. Illustrate how to use profit and loss statements to provide key analysis to help in decision making;
4. Consider the merits of attracting and retaining associates;
5. Articulate a business case for access to justice in one's practice; and
6. Articulate a business case for being inclusive and diverse in one's practice.

### Workshop Timeline:

9:00	Introductions and housekeeping	12:00	Lunch Break		
9:30	Section A: Revenue analysis	1:00	Section B: Case Study: Do we hire an associate or designate a paralegal?		
10:00	Section A: Case Study: The Woodshed	1:30	Section B: Case Study Conclusions: Do we hire an associate or a designated paralegal?		
10:30	Morning break				
10:45	Section A: Case Study Conclusions: The Woodshed	2:00	Section C: Partnership	3:00	Putting it together: Case Study Conclusions:
11:15	Section B: Leverage	2:15	Afternoon break	3:30	Putting it together: Retention The Case for Inclusivity and Gender Balance
11:30	Section B: Leverage Examples	2:30	Putting it together: Case Study: Who do we invite to the partnership?	4:00	Summation and Goodbyes

**INSTRUCTOR** Lisa Dawson, senior law firm administrator

**CPD HOURS: 6.5 INCLUDING ETHICS, PROFESSIONAL RESPONSIBILITY, CLIENT CARE RELATIONS HOURS: 6.5**

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## Associates: What Are We Supposed To Do With Them?

**A**s the firm administrator, I was at a recent strategic planning meeting in a law firm with 10 partners.

The question we started with was: why have “associate” lawyers and who are these “associates”?

We considered:

- Longevity of the firm – replace outgoing partners (succession planning).
- Profitability (if associates are properly utilized, managed and developed)
- Competitiveness within the market with other firms and in house counsel of same practice area(s).
- Provides people power
- Helps to develop new, complimentary and aligned practice areas to grow the firm into the future.

Then, we turned the discussion to, “who are associates?” and the room went silent.

- What’s in that title? Maybe we should call some of them “resident associates or permanent employees” rather than “associates on partner track” as, clearly, not all associates were wanting or were pursuing partnership track.
- Perhaps we could leverage paralegals in some areas where a lawyer is not required to perform certain kinds of work.
- Maybe we should define “associate lawyer” in our firm so we can clarify expectations
- We do know that our associates were not the same as partners for several reasons, the most obvious being they were younger and not as experienced.

Our firm follows a traditional model. We hire summer students and they turn into articling students who become our

base for the “Associate Pool”. We assumed by “growing our own” they will grow to be just like the partners. We acknowledge that associate attrition and turnover is simply the cost of doing business. We assume that nobody makes a profit out of these juniors for 2-3 years....and in many cases....longer.

However, there were some questions we never asked ourselves:

- What’s the cost of recruitment?
- What is the selection criteria?
- Is criteria based on any succession planning?
- Who is the competition?
- What are benchmark salaries?
- What other compensation and incentive strategies are used to motive and reward associates?
- How can we differentiate from competing firms?
- What statistics are useful to measure the return on investment of an associate?
- How to increase profitability of associates?
- How to improve the utilization rate of associates?
- What is the impact on current profit sharing and alternatives to profit sharing options?
- What does associate development look like?
- How to prevent turnover...is some turnover good? What is our growth strategy?
- How to reduce the expectation (generation) gap?
- What is the common philosophy towards associates?
- How to conduct reviews?
- What do associates really want?
- Monetary and non-monetary
- What is mentoring?

Each firm will have find their own list of questions they have not properly

addressed. In our firm, all partners agreed, that to successfully utilize associates, the partners have to become willing to let go of the lower level work and commit to doing:

- more important, rewarding, less difficult work
- rain making and networking
- firm management and development

Since our partnership agreement did not incentivize the partners to do this, we got stuck right here. All firms will also get stuck on their own set of issues that result because of partnership agreements or differentiating points of view within the partnership group.

Assuming our associates would have the same mentality towards their work, our clients, their career and partnership was our second biggest mistake. We needed a lesson in the generation gap. Who makes up the generations and what is the gap? What is the impact of the gap on our firm?

Here are 6 ways that we used to bridge the gap:

1. We defined mentoring and coaching
2. Provide education to partners
3. Involve HR and the Administrator
4. Set clear criteria and review frequently.
5. Measure:
6. Address our number one challenge.

Every firm will be different in how they go about this process but, asking the question: “Associates: why do we have them and what to do with them?” is a good place to start.

*Lisa Dawson heads her own law firm consulting business. Join her when she presents Business of Law 201 on June 3, 2016.*

