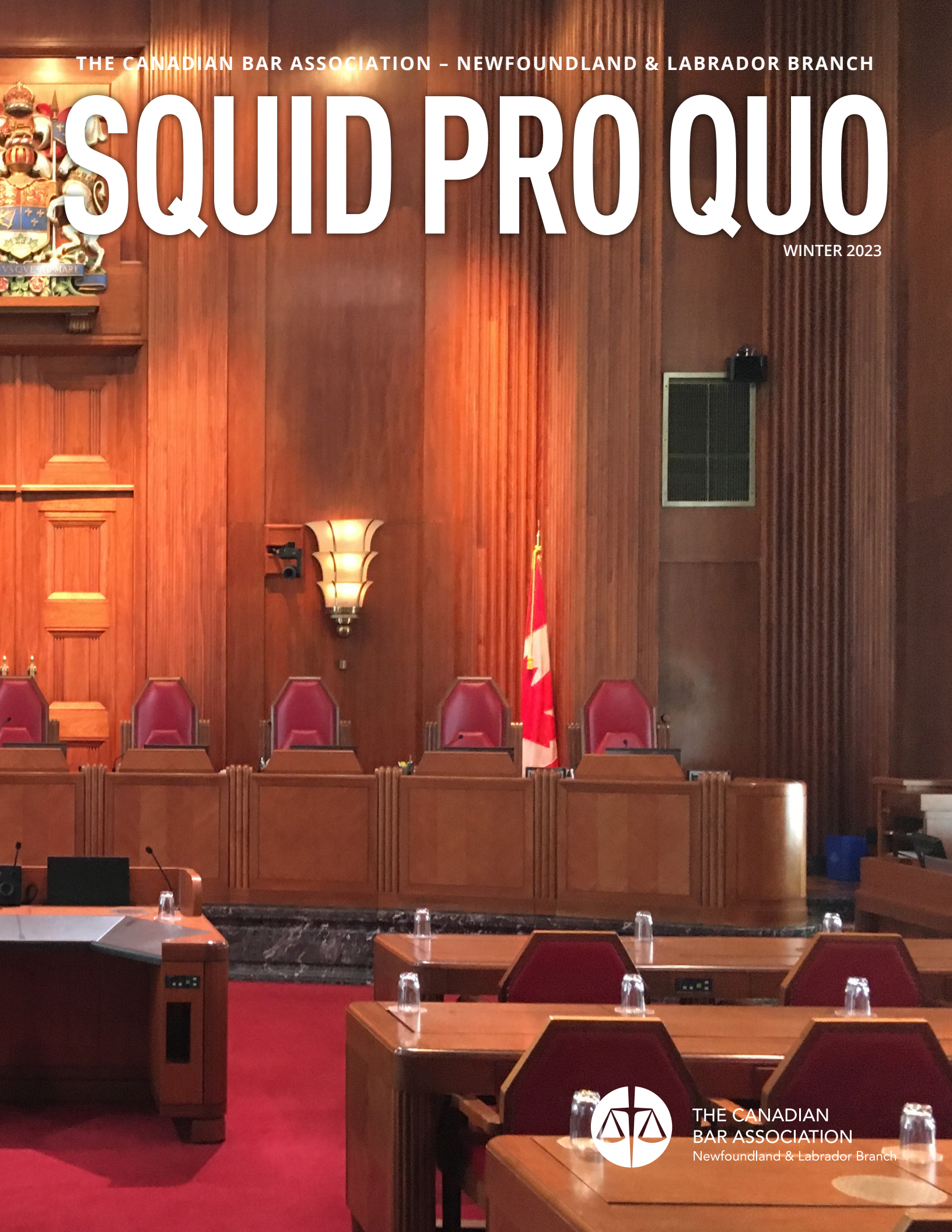


THE CANADIAN BAR ASSOCIATION - NEWFOUNDLAND & LABRADOR BRANCH

SQUID PRO QUO

WINTER 2023



THE CANADIAN
BAR ASSOCIATION
Newfoundland & Labrador Branch

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TABLE OF CONTENTS

- 3** President's Report
- 4** Community Justice Connect
- 5** National Update
- 6** Perspective From The Bench
- 7** Professional Development

Opinions expressed herein are not necessarily those held by CBA-NL. *Squid Pro Quo* is a publication of CBA-NL and is intended to provide a service to members by informing them of Branch activities and matters of general interest.

Members are encouraged to submit articles for publication, though articles submitted may, at the discretion of the magazine committee, be edited for brevity and clarity, in which case the author will be consulted prior to publication.

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Squid Pro Quo can also be found on the CBA-NL website at www.nl-cba.org.

LETTERS TO THE EDITOR

Squid Pro Quo welcomes letters to the editor from CBA-NL members wishing to express observations, opinions, corrections, brief reports, or comments on previously published articles. Letters to the Editor must not exceed 250 words in length. Published letters will be edited for clarity and length without the prior approval of the author. Unpublished letters will not be returned. Signatures of all authors are required, together with the author's contact information. Pen names and anonymous letters will not be published.

CBA-NL will not accept responsibility for statements made by contributors.

PRESIDENT'S REPORT



I am pleased to bring you the President's Report for the January 2023 volume of *Squid Pro Quo*.

This is our second volume since the re-launch last summer. In this volume, you will find an article on restorative justice, as well as comments on advocacy and practice from Justice Goodridge of the Court of Appeal. You will also find other useful information about the Branch, as well as CLE opportunities.

I began my term as President of the CBA-NL on September 1, 2022. My term began with no small amount of excitement, and no small amount of uncertainty – two things that seem to be reflective of my legal career.

On September 8, our long-serving Executive Director, Ashley Woodford, left to pursue a new career path. Ashley was our Executive Director, and only employee, for over 12 years. She was, for me and for many of you, the face of the CBA-NL. We will miss her dearly at the Branch, and we wish her all the best.

But with change comes opportunity! On October 31, we welcomed our new Executive Director, Rod Harris. Rod has been on the job only a few months, but has already proved himself to be a valued colleague and a boon to the membership in this province.

Shortly after Ashley's departure, Melanie Del Rizzo, K.C., our provincial

representative on the CBA National Board of Directors, was appointed to the Supreme Court, Family Division. The Branch extends our sincere congratulations and thanks to Justice Del Rizzo (as she now is) on her appointment and her service to the CBA-NL.

So, a new member of the Board of Directors had to be found. That position was soon filled by my predecessor as President, Andrew Wadden, K.C., who stepped into that role on November 8, 2022.

I think many of you will see what's coming – on January 4, 2023, Judge Wadden (as he now is) was appointed to the Provincial Court. Andrew was an invaluable colleague on the Executive Council of the CBA-NL, and was an excellent resource for me as I stepped into the President's role. We wish him the best of luck in his new role.

Excitement and uncertainty!

On November 25, I brought greetings and congratulations on behalf of the CBA-NL on the swearing-in of Justice Thomas Johnson. It was a great ceremony, made greater by the presence of so many of Justice Johnson's family members, colleagues, and friends.

On December 9, our new National President, Steeves Bujold, brought his greetings and congratulations on behalf of the CBA on the swearing-in of Justice Del Rizzo.

As President, I have set advocacy and education as my priorities for the Branch for 2023.

On the advocacy front, the Legislation and Law Reform Committee is continuing its work of reviewing and advising on areas of concern to our members. In January, I will

be participating (with our past President, Greg French) in public consultations regarding proposed amendments to the adverse possession provisions of the *Lands Act*. The report our Legislation and Law Reform Committee published can be found here: <https://www.nl-cba.org/Sections/CBA-NL-Committees>.

That Committee's work continues on other fronts, and we welcome any recommendations from our members about issues to explore.

On the education front, we are in the process of planning another full-day CLE program in the coming months. Many of you will remember the last full-day program at Marble Mountain (in pre-pandemic times), which was a tremendous success. The pandemic has stymied our efforts to get another one on the books, but we are committed to getting as many of us together as possible for another great day (and for as many of your mandatory 15 hours of CPD as we can fit in).

We also continue to offer excellent programming through our various Sections, details which can be found here: <https://www.nl-cba.org/Sections/CBA-NL-Sections>.

The CBA-NL only succeeds due to the efforts and engagement of our members. I encourage all of you to participate in the Branch's activities in any way you can – whether it be joining a Section, joining the Executive, contributing to *Squid Pro Quo*, or organizing a CLE.

If you have any questions or thoughts about our work, or if you have any concerns as a member, please always feel free to reach out to me.

I wish you all a happy and healthy 2023.

COMMUNITY JUSTICE CONNECT

BUILDING A RESTORATIVE JUSTICE PROGRAM WITHIN THE NL HUMAN RIGHTS COMMISSION



"There has to be a better way"

We say this at the Newfoundland and Labrador Human Rights Commission often. We recognize racialized and Indigenous communities are underrepresented, marginalized and disproportionately receive worse outcomes in justice and community service systems. Within the Human Rights Commission, and our complaint-based response to harm, we see limitations that show up throughout all aspects of the broader justice system. What follows is our experience grappling with finding better ways to support racialized and Indigenous community members who experience racial harm, conflicts rooted in systems of oppression and civil justice issues.

The NL Commission accepts on average 100-120 new cases a year. A small number of cases are related to race as a prohibited ground. There are challenges using the complaints processes to address racism and racist acts. Our traditional justice system was designed to benefit some, while oppressing others; this system often does not work for Indigenous and racialized communities. While the Commission accepts human rights complaints if the allegations fall within our statutory mandate, our legislation is quite restrictive. If a complaint is accepted, human rights case law does not always appreciate the nuances of systemic racism. Sometimes, people don't know that

the Commission exists as a resource or are scared to file a complaint because they don't want to be seen as 'causing trouble'. Others don't trust government, because of their lived experience, to solve their problems. People also do not want to file official complaints because legal and adversarial process take too long and are emotionally exhausting.

The subtle scent of racism is extremely difficult to demonstrate. Racialized people will tell you, they can just feel it, and the legal remedies available can be unsatisfactory or further harming. We were not sure what was possible or appropriate, but recognized the importance of:

- a different way to help people who were in conflict or had experienced harm;
- a service that could assist in everyday issues, such as neighbour disputes or understanding legal forms;
- the service needed to be rooted in community and involve the communities that were affected.

Thinking about how we can address conflict and harm in different and less adversarial ways led staff to restorative justice and the eventual creation of Community Justice Connect. Initially funded through a \$165,000 grant from the Department of Canadian Heritage's Anti-Racism Action Program, with in-kind support from

the Government of Newfoundland and Labrador, the program soft-launched in July 2021. Through Community Justice Connect, we provide a variety of conflict resolution and restorative justice services to Indigenous, racialized and religious minority communities throughout Newfoundland and Labrador, regardless of immigration status.

With a focus on identity-based harm, the framework for Community Justice Connect was developed using the lenses of restorative justice, anti-racism and anti-colonial ways of being. We wanted the model for Community Justice Connect rooted in Restorative Justice; we wanted a way of approaching a difficult situation that focuses on the harm done and the needs and obligations of the people involved. We also wanted to ask questions and create awareness of racial justice, power imbalances, and structural and systemic issues. We do this through the questions we ask at the individual, system/structure and community levels during all stages of a Community Justice Connect process. We have trained staff and volunteers in anti-racism, anti-oppression, restorative justice, Indigenous history and culture, and trauma informed practices. We are building the capacity for staff and volunteers to hold dialogue and lead processes on racial harm, systemic racism, harassment and discrimination.

The response to Community Justice Connect has outpaced capacity. People want relational options; they want the ability to choose to engage in a less adversarial way. Our services are adaptive to the needs of

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the participants. They can range from one or two conversations with a participant (to help them identify their options), to many case development meetings (that has led to a facilitated dialogue and settlement or where parties never came together but the matter resolved); or others simply may want to continue with their complaint process. We also look for trends in cases and seek to identify systemic issues affecting Indigenous, racialized and religious minority communities.

We are currently working on identifying funding sources to grow our program. We simply need more staff and more capacity to manage the response. We have also seen the need for legal advice in a Community Justice Connect team approach. In many of our cases, participants reported financial barriers to accessing legal services. Obtaining legal advice with lawyers who are

racialized, who have lived experience and understand systemic racism is challenging in our province. This winter, with funding through the Law Foundation of NL and the NL Department of Justice and Public Safety, Community Justice Connect engaged a local law firm to research and determine if Community Justice Connect could engage a lawyer as a part of our team approach.

As we look around we see good work happening in our province – Relationships First received \$600,000 in funding from the Government of Newfoundland and Labrador to grow restorative justice over the next three years in education, justice and community. Indigenous groups throughout Newfoundland and Labrador are building restorative justice processes within communities that are culturally relevant and responsive. The restorative justice lab out of Dalhousie University received federal funds to help accelerate restorative justice nationally. All of these efforts help us

reimagine justice in our province.

We are excited at what year two will bring to the development of Community Justice Connect, and the Commission. We know the work of Community Justice Connect cannot be done in isolation, so we are reviewing the Commission as a whole. We are engaged in a renewal – modernizing our processes to be trauma informed, person centred, relational, and rooted in restorative and racial justice principles. People are at the center of this change. If you have reflections on the human rights complaints process or are interested in connecting on restorative justice and our work with Community Justice Connect, please email us.

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NATIONAL UPDATE



What a pleasure it is to be writing for a new edition of Squid Pro Quo, the CBA-NL Branch magazine! I want to take the opportunity to thank all the CBA-NL Branch Section Chairs who serve on their national section executives and have an important role to play as a conduit between the local and national members. The work done by our members in our branches is what makes the CBA so exceptional and vibrant.

When I began my term as CBA President, I announced that my two personal

priorities would be, first, to ensure that judicial independence, an essential pillar of our democracy, is better understood, protected and valued and, second, to work on improving diversity within the legal community including addressing the needs of the members of the LGBTQ2S+ community, in particular non-binary and trans people.

In the past months, I have been meeting in person with many CBA members in various branches across the country and I have been able to discuss these priorities and talk about the important role we can all play to defend the rule of law and judicial independence and be strong advocates for equality, diversity and inclusion in the legal profession.

As the largest association of legal

professionals in the country, the CBA works every day to provide lawyers with the tools they need to be the best they can be. It also works to ensure the Canadian legal profession is more diverse and inclusive of everyone. And last but not least, the CBA is an independent and powerful voice for legislative, regulatory and policy development that affects Canadian legal law and practice. We are the only national association of lawyers with a mandate to protect the professional and commercial interest of the legal profession and to promote the rule of law.

I look forward to ongoing collaboration between the National office and the Newfoundland and Labrador Branch as we continue providing value to our CBA members.

PERSPECTIVE FROM THE BENCH



The following is a précis of my comments during the CBA panel discussion (April 29, 2022) 'Perspectives from the Bench'.

What experience, in a legal career, can best prepare someone for work on the Bench?

Teaching, as a complement to a law practice, is a great foundation for work on the Bench. Surprisingly, much of a judge's daily work activity, closely aligns with that of an academic, especially so in the Court of Appeal. The final decision is the product of much reading, researching and writing. Teaching engages similar skills. You must know the subject matter in detail and then condense it for a clear and compact presentation. In judging, you do the same. Detailed evidence and legal issues are condensed for a clear and compact final decision.

Litigation experience is obviously valuable in preparing for a career on the Bench. Skills used by a judge on a daily basis – settlement conferencing, trial management, applying rules of procedure or evidence, managing high emotions – are all skills learned through a litigation practice. In family matters especially, the resolution is often more about the judge's ability to manage the high emotions and the people, than about application of the law.

What are some good practices, and not so good practices, in virtual video proceedings?

Good practices

- Do not read from notes – reading

verbatim from notes is never a good delivery style;

- In appellate advocacy, treat questions as opportunities to engage dialogue with panel judges;
- Good preparation – same effort as an in person proceeding; and
- Maintain the same formality as you would for an in person proceeding.

Bad practices:

- Leaving the camera view;
- Turning off camera; and
- Reading from your factum.

What are the traits you observed in successful and effective lawyers?

- Sees both sides of every issue and responds to opposing side's arguments;
- Concedes the obvious and does not raise marginal arguments;
- Persuasive, without being argumentative or combative;
- Files a book of authorities based on quality not quantity;
- Responds to questions with clarity and brevity; and
- Highest ethical standards.

What advice could you offer to new lawyer?

- Be yourself, as everyone else is taken (attributed to Oscar Wilde);
- Preparation – preparation – preparation (attributed to Hon. Jack Majors, retired SCC judge);
- Keep a good work life balance;
- Be reliable – do what you promise and do not make a promise that you cannot deliver on;
- Never compromise your ethical standards; and
- Do not be too fixed in your goals, especially long term ones or your idea of the fulfilling practice of law. Far better to let the road take you where it is going than force a direction. Opportunities will present if you keep your eyes open.

What do you wish the public knew about the justice system?

- What goes on behind the scenes (outside the courtroom) – the dedication and effort by lawyers, juries, and judges, as they work toward a just and lawful outcome;
- Judicial independence – judges are not beholden to any political party, government official, or lobby group. Judges in Canada have nothing to gain by being loyal to anyone. All have security for life, with good salary and benefits.
- Canadian Criminal justice system, with all its issues, is still one of the best in the world, consistently ranking in the top 5% based on World Justice Forum rule of law index.

Do you believe that appeal courts should strive for unanimity?

Based on recent year's sample, the NL Court of Appeal issues unanimous decisions about 80% of the time, dissents in about 7%, and concurring reasons in about 13%. The united voice from a unanimous decision helps ensure certainty of law.

How do you approach consensus building on the Court of Appeal?

When a panel judge proposes to write separate concurring, or dissenting reasons, there will be more discussions during panel meetings pre-hearing, post-hearing, and when the draft reasons for dissent or concurrence are presented. These discussions become quite lively. On occasion, there is compromise, enough for the judge with the dissenting or concurring opinion to join the majority. Of course, if the dissenting member does not agree with majority, or if the majority refuses to make any compromise, then a split decision inevitably flows.

How do you view the differing roles you served

as a finder of fact as a trial judge versus now sitting as an appeal judge?

There is a high level of deference to factual finding based on credibility assessments. These are not reviewable unless palpable (obvious) and overriding (affected the result) error. Factual inferences are treated with less deference.

There are varying degrees of deference among judges; reasonable judges can still have differing views on whether an error is palpable and overriding.

How do you think counsel can best supplement or enhance written submission during the oral submissions?

The best way to supplement the written

submission is by responding, during oral submissions, to the opposing side's factum. Zero in on the arguments of opposing counsel and explain why these arguments should not prevail. The judges will have read your factum closely, and you will not be helping the court if you just read out what is written in your factum, without responding to the opposing side's arguments.

As I stated above, treat questions from the panel as opportunities. A good appeal hearing is more of a dialogue than a monologue. The questions from the Bench are going to tell you the areas where the judges are having difficulty, so do not dodge these questions. Anticipate them and prepare accordingly.

Self-represented litigants:

In civil and family appeals, we have around 30% where one or both parties are self-represented; in criminal matters, we have less than 5% where an accused is self-represented.

Legal Aid provides counsel where a party qualifies within the 'means and needs' test set out in the Legal Aid Act and regulations. We rarely order the Attorney General to fund private counsel of choice, after a party has been rejected by Legal Aid.

There are monthly status hearings at the Court of Appeal for all self-represented litigants. We guide each of them through the process. We do not provide legal advice, but we do provide procedural advice, giving the steps to follow to keep a matter moving.

PROFESSIONAL DEVELOPMENT

LAW SERIES



Every year, the CBA Law Series brings together a faculty of experienced practitioners from diverse areas of practice to present substantive law webinars that fall under five pillars: (1) new developments; (2) new case law; (3) best practices; (4) legal ethics; and (5) current events.

These webinars are presented by CBA Sections.

Jan 30, 2023	Brave New World of LMIA - How To's and Practical Tips for the LMIA Online Portal 12:00 pm - 1:30 pm ET
Feb 13, 2023	What's New in Canadian Auto Insurance: Past and Present Experiences 12:00 pm - 1:30 pm ET

CBA ONLINE SYMPOSIA

Enhance your expertise with national conference programs that have shifted online.

Presented by CBA National Sections

Feb. 3, 2023	CBA Sexual Orientation and Gender Identity Community Online Symposium
Apr. 18, 2023	CBA Constitutional and Human Rights Law Online Symposium
Apr. 25, 2023	CBA Elder Law Online Symposium
Jun. 14, 2023	CBA Pensions and Benefits Law Online Symposium
TBA	CBA Alternative Dispute Resolution Online Symposium

For more information and to register, visit www.cba.org/Professional-Development.

