RULE OF LAW REPORT

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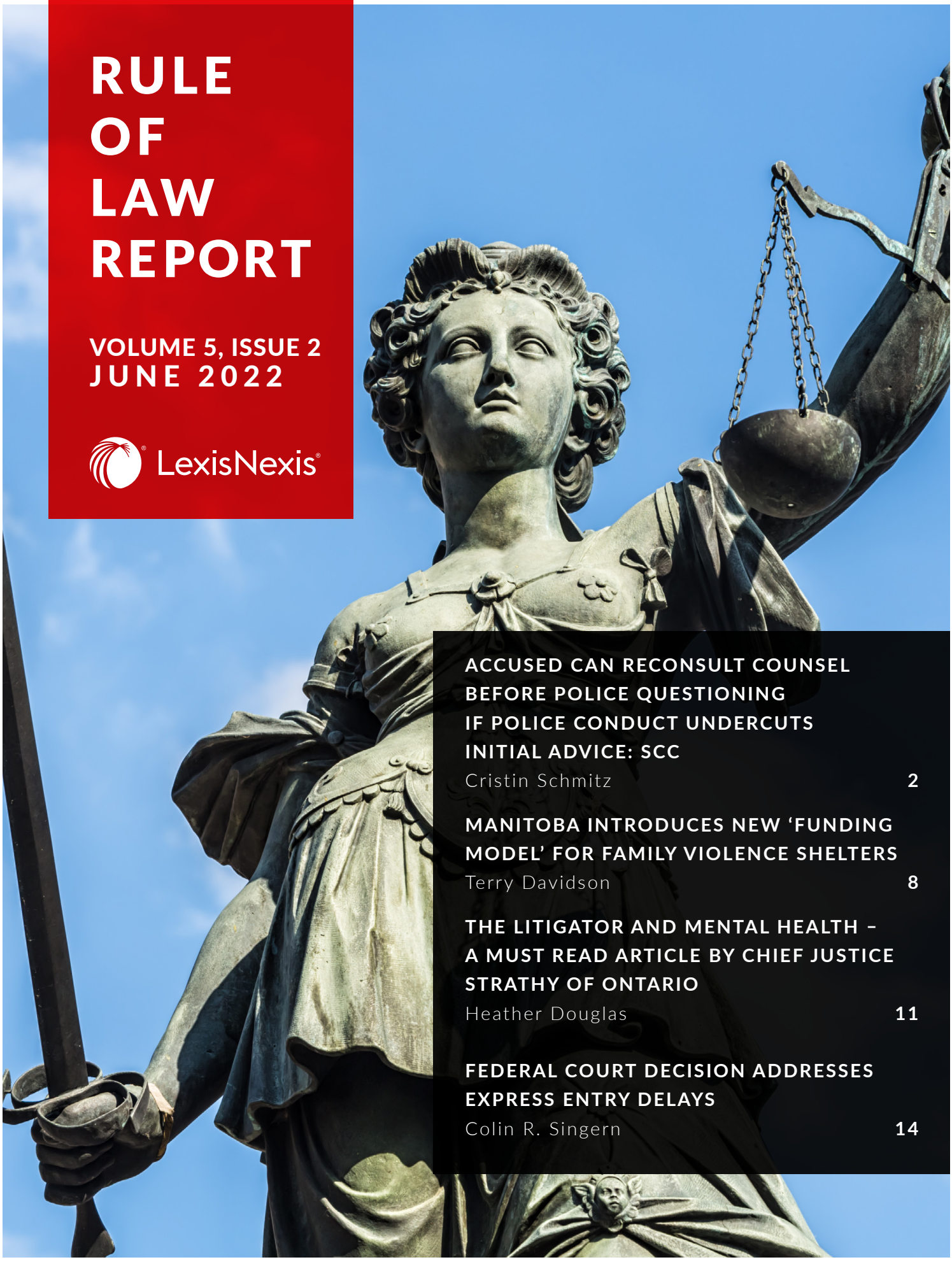

ACCUSED CAN RECONSULT COUNSEL BEFORE POLICE QUESTIONING IF POLICE CONDUCT UNDERCUTS INITIAL ADVICE: SCC

By Cristin Schmitz
(Originally published in *The Lawyer's Daily*,

In a judgment that sheds new light on the "implementational duty" of police to provide a detainee with a reasonable opportunity to consult counsel, the Supreme Court of Canada has ruled 9-0 that a detainee must be given the opportunity to reconsult with a lawyer before being questioned by police in circumstances where it is objectively observable that police conduct has caused "the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it."

R. v. Dussault, written by Justice Michael Moldaver on behalf of the top court, provides guidance on whether and when police are required to go beyond providing a detainee/accused with an initial opportunity to consult counsel before police begin their interrogation: *R. v. Dussault* 2022 SCC 16.

The general rule set in the leading case of *R. v. Sinclair*, 2010 SCC 35, stipulates that in normal circumstances, once a detainee has consulted once with counsel, the police are entitled to begin eliciting evidence from the detainee.

However, *Sinclair* recognized three categories of "changed circumstances" after the initial consultation with counsel that can renew a detainee's right to exercise the s. 10(b) *Charter* right to consult counsel: (1) new procedures involving the detainee; (2) a change in the jeopardy facing the detainee; or (3) reason to believe that the first information provided was deficient.

Justice Moldaver's judgment elaborates on the third category of exception to the general rule.

In particular, the Supreme Court of Canada ruled that the right to counsel may be renewed if police "undermine" the legal advice that the detainee has received — which can occur, for example, when police undermine confidence in the lawyer who provided that initial advice.

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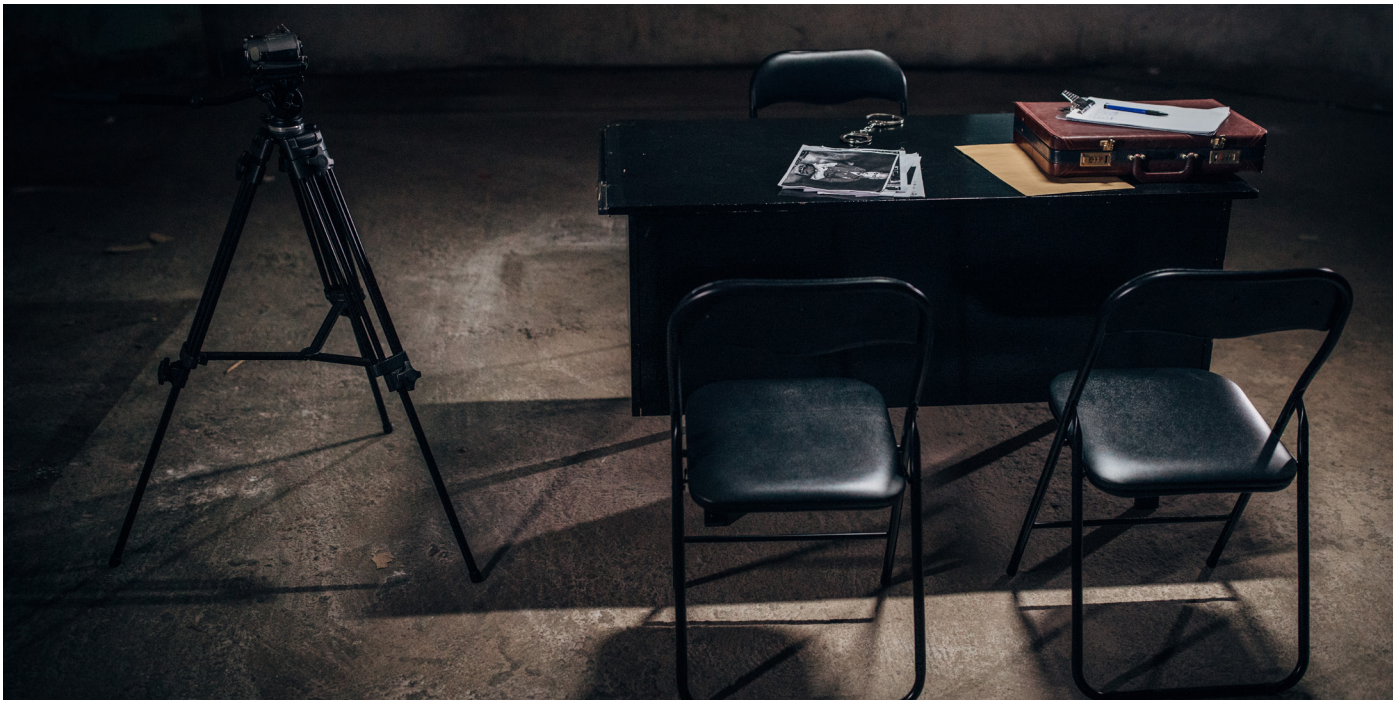
"A detainee's confidence in counsel anchors the solicitor client relationship and allows for the effective provision of legal advice," explained Justice Moldaver, who was himself a prominent Toronto defence counsel before he joined the bench.

"When the police undermine a detainee's confidence in counsel, the legal advice that counsel has already provided may become distorted or nullified," Justice Moldaver said. "Police are required to provide a new opportunity to consult with counsel in order to counteract these effects."

Justice Moldaver elaborated that such "undermining" is not limited to police intentionally belittling defence counsel or intentionally undercutting the legal advice first received.

"Police conduct can unintentionally undermine the legal advice provided to a detainee," Justice Moldaver observed. "The focus should remain on the objectively observable effects of the police conduct, rather than on the conduct itself.

"Where the police conduct has the effect of undermining the legal advice given to a detainee, and where it is objectively observable that this has occurred, the right to a second consultation arises," he held. "The purpose of s.10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it."



University of Calgary law professor Lisa Silver told *The Lawyer's Daily* "Justice Moldaver does a nice job in the decision of reminding us of the importance of the solicitor-client relationship."

She highlighted Justice Moldaver's endorsement of Ontario Court of Appeal Justice David Doherty's observation in *R. v. Rover*, 2018 ONCA 745, that the right to counsel is a "lifeline" through which detained persons obtain legal advice and "the sense that they are not entirely at the mercy of the police while detained," calling it "a stark reminder of counsel's role in the justice system" and in animating a client's *Charter* rights.

A key takeaway of *Dussault* is that police "should be very careful when speaking of counsel, and vigilant in listening to the detainee," Silver advised. "Also, the Crown should be careful in

giving advice to the police based on case law," Silver said. "In this case, the *Sinclair* decision was not a full answer to the situation because it was still open to interpretation. That interpretation can change based on the context. Defence need to be vigilant in their interactions with their client and the police when a client is detained and need to ensure that their client's needs and instructions are known to police and recorded by counsel."

Silver said one difficulty she has with the Supreme Court's latest decision on s. 10(b) is that whether counsel's advice has been undermined will only be determined after-the-fact, in court.

"I am not convinced that police will be in a position to know or realize that their conduct is in effect undermining confidence in counsel," she explained. "Therefore, they will not be able to operationalize the right to reconsult."

She cautioned that police should refrain from commenting on counsel at all "or face difficulties in determining whether they have triggered the right to reconsult. For instance, one of the ways a right to reconsult arises is when the detainee's jeopardy changes. This would be readily observable by the police. But knowing when there is an undermining of advice, unless intentional, will be difficult."

Anil Kapoor of Toronto's Kapoor Barristers, who with Victoria Cichalewska represented the intervener Criminal Lawyers' Association, said he sees the main takeaway from the decision as "the police should avoid using the tactic of denigrating counsel's advice or role to persuade people to abandon their right to silence. That is impermissible."

The Supreme Court dismissed the Quebec Crown's appeal from a Quebec Court of Appeal judgment ordering a new trial for Patrick Dussault, who was convicted of second degree murder by a jury in 2016: *Dussault c. R.*, 2020 QCCA 746.

The Court of Appeal concluded that police violated Dussault's right to counsel and, pursuant to *Charter* s. 24(2), excluded an incriminating statement Dussault made to police when they interrogated him without fulfilling their duty to provide him with a reasonable opportunity to consult counsel.

Justice Moldaver said that the appellant Crown properly conceded at the Supreme Court that if the accused's *Charter* right to counsel was breached by police, his statement should be excluded under s. 24(2).

Justice Moldaver concluded that "in this case, the conduct of the police had the effect of undermining and distorting the advice that Mr. Dussault had received. The police ought to have offered him a second opportunity to re-establish his 'lifeline', but they did not. In failing to do so, they breached his s.10(b) rights."

Dussault was arrested in August 2013 on charges of murder and arson. The police informed him of his rights, including his right to counsel under the *Charter*. At the police station, the accused spoke to a lawyer by phone who explained the charges against him and his right to remain silent. The lawyer got the impression that the accused was not processing or understanding his advice. When the lawyer offered to come to the station to meet Dussault in person, the accused accepted. The lawyer then spoke with a police officer, told him he was coming to the police station, and asked that the investigation be suspended in the meantime. The police officer responded that this would be no problem or no trouble. The lawyer then spoke again with the accused. He told him he was coming to meet with him in person and explained that Dussault would be put in a cell in the interim.

Counsel advised Dussault not to speak to anyone.

But after a conversation between the police officer and the lead investigators on the case, police decided counsel would not be permitted to meet with the accused. The police officer informed the lawyer of this by phone. Counsel nevertheless came to the police station, but was

not allowed to speak with the accused.

The police officer later went to Dussault's cell and told him that another officer was ready to meet with him. Dussault then asked whether his lawyer had arrived, to which the police officer responded that the lawyer was not at the police station.

Police then interrogated Dussault, who made an incriminating statement to them. The trial judge found that the accused had exercised his s. 10(b) right to counsel and that police could reasonably assume that he had done so in a satisfactory manner. Accordingly, she rejected Dussault's request to exclude his incriminatory statement.

In finding a s. 10(b) violation, Justice Moldaver reasoned that two separate acts of the police officer combined to have the effect of undermining the legal advice provided to the accused.

"In refusing to permit the lawyer to meet with the accused, the police effectively falsified an important premise of the lawyer's advice — i.e., that the accused would be placed in a cell until the lawyer arrived," he said. "Second, the police officer misled the accused into believing that his lawyer had failed to come to the station for their in-person consultation. During the interrogation, the accused repeatedly expressed that his lawyer had told him he would be there; he stated his belief that his lawyer had never actually arrived; he openly questioned why his lawyer had given him the advice that he had given; and he implied that his lawyer's failure to show up had left him feeling alone."

"When these statements are taken in their totality and in light of all the relevant circumstances, it is clear that there were objectively observable indicators that the legal advice given to the accused had been undermined," Justice Moldaver held.

MANITOBA INTRODUCES NEW 'FUNDING MODEL' FOR FAMILY VIOLENCE SHELTERS

By Terry Davidson (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Manitoba's government is introducing a new "funding model" for its "inadequate and inequitable" family violence shelter system.

According to an April 25 news release, the new model will be put in place for shelters funded by the Family Violence Prevention Program (FVPP) in a bid to "improve operations of the family violence sector and better protect vulnerable Manitobans."

The FVPP provides funding for 30 agencies, with the money going towards services for "residential and non-residential participants, follow-up services and children's counselling."

The release states that the new model will be implemented through a "phased approach," which will include an investment of $3.2 million in the first year to "support additional staff and salary increases at all shelters."

Changes also include the incorporation of "gender and diversity analysis," the adoption of tools to ease the onboarding of new agencies and increased funding for crisis line operations.

The release notes that the current funding model was first established back in 1987 and is "based on the number of overnight stays in the shelter." The new model and the resulting increased staffing, it states, would ensure quality services for both those staying in a shelter and those using "transitional housing options."

Rochelle Squires, Manitoba's minister responsible for the status of women, stated that "adequate supports for survivors of family violence is a key priority," and that "engagement with the sector has helped … identify areas where improvements are needed."

"Over the last several years, it has become increasingly apparent the current funding model for shelter agencies has become inadequate and inequitable," said Squires. "This new model will help align funding equity, ensure accountability and better protect vulnerable Manitobans."

Squires also noted that the impacts of COVID-19, an increase in demand, a decreased ability to retain skilled staff and an influx of those with "complex needs" has resulted in "significant concerns" on the part of both staff and clients.

Manitoba Association of Women's Shelters' spokesperson Amrita Chavan noted the impacts of COVID-19 on the shelter system.

"The pandemic has not only increased the risks and severity of gender-based violence (GBV), but it has also affected the ability of [family violence] shelters to continue their lifesaving work on the front lines," she said. "The new funding model will allow shelters to develop tangible solutions to historic operational challenges, including access to training, retention of qualified and consistent staffing, adequate resources for clients with complex needs, and safe staffing levels."

> "Communities, families and individuals all benefit when we work together to address gender-based violence."

Agape House-Eastman Crisis Centre executive director Tracy Whitby said the goal is to have survivors and their families receive higher-quality help.

"With the support of many stakeholders in the family violence (FV) field, I believe that FV shelters will emerge stronger and more resilient that ever," said Whitby. "Communities, families and individuals all benefit when we work together to address gender-based violence. Our goal is to ensure individuals receive the resources and supports they need and that families are equipped to make healthier choices. We now have an opportunity to expand our expertise and skills to continue to provide trauma-informed care and implement best practices that our survivors deserve."

THE LITIGATOR AND MENTAL HEALTH – A MUST READ ARTICLE BY CHIEF JUSTICE STRATHY OF ONTARIO

By Heather Douglas (Originally published on Slaw)

In **"The Litigator and Mental Health"**, Chief Justice Strathy writes about mental health in our profession and what we can do to improve it. Unfortunately, practicing law can be damaging to one's mental health. In fact, there is a strong correlation between traditional markers of success in the law and depression in lawyers.

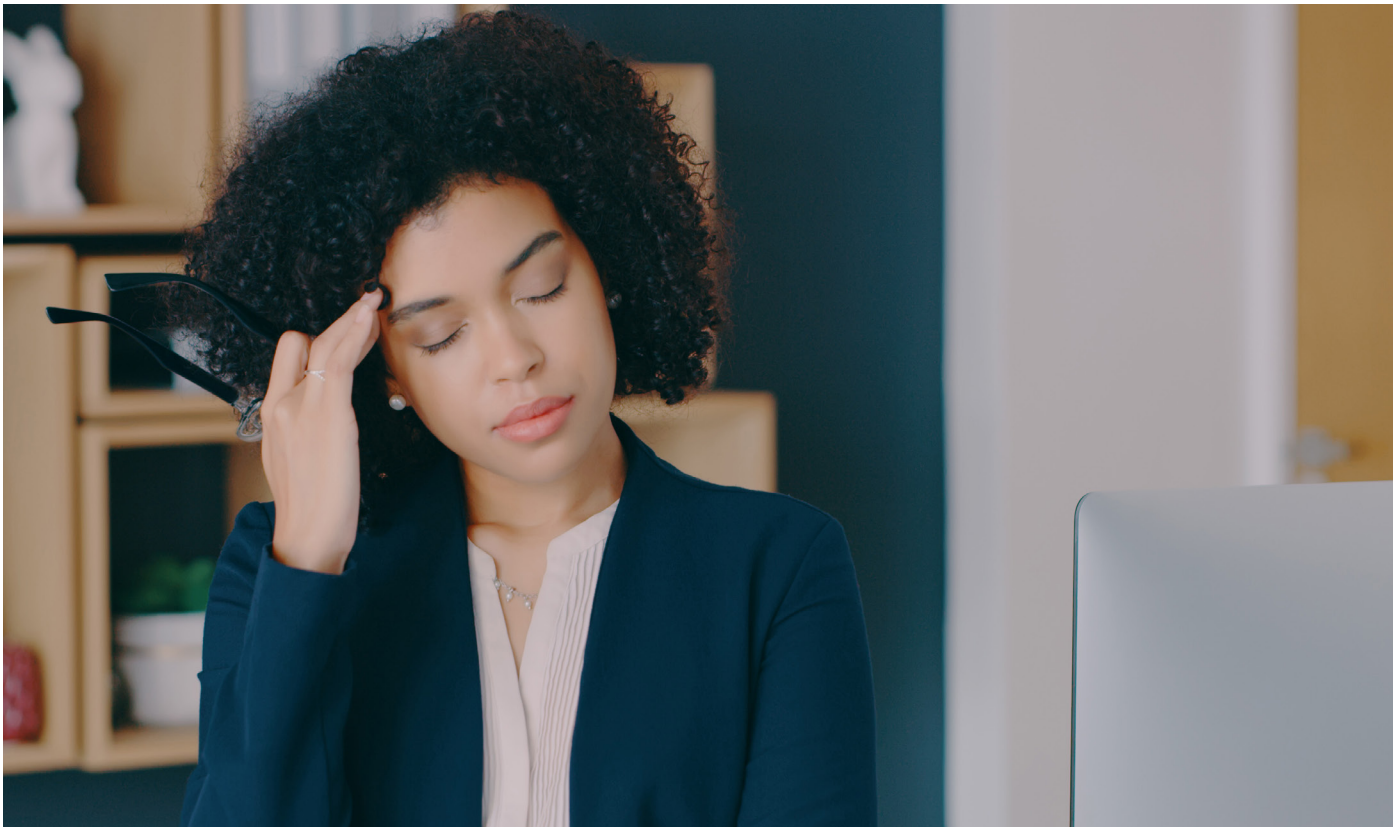
One of the recommendations Justice Strathy makes is eradicating the myth of the "fearless gladiator". The fearless gladiator powers through long work hours with pride, never breaking emotionally, never taking time off, focusing exclusively on work, and has a stay-at-home spouse to take care of him. He plays hard. He works harder. He never makes a mistake. He is perfect.

> "This gladiator does not exist. But the myth pervades."

This gladiator does not exist. But the myth pervades. And in doing so, it feeds into feelings of imposter syndrome. This feeling is made worse for lawyers from traditionally marginalized groups, who rarely see themselves reflected back in the top echelons of the profession or who are forced to deal with micro-aggressions that undermine their confidence.

Justice Strathy comments that "[f]eelings of isolation, uncertainty and stress experienced by Black, Indigenous, racialized, LGBTQ2S counsel, women, those with different accents and internationally trained lawyers are too frequently viewed as an individual issue rather than understood as the result of subtle acts of exclusion. It is hard not to feel like an imposter where a person's feelings of not belonging are exacerbated by signals that they were never supposed to be there in the first place. Overcoming imposter syndrome requires an environment that fosters a variety of leadership styles in which diverse racial, ethnic, and gender identities are seen as just as professional as the current model."

One solution towards addressing this problem is switching from the gladiator myth to the growth mindset. "A growth mindset views intelligence and talent as abilities to be cultivated through effort and practice, learning from mistakes, and sticking to it when it is not going well. By contrast, the gladiator litigator sees every success or failure in litigation as a measure of self-worth. It is easy to chalk up wins, but it is how we respond and learn from losses that will determine our level of stress and success in a litigation career."



Justice Strathy's point that it's how we respond to the losses that matter is critical. To quote the great basketball player Michael Jordan, *"I've missed more than 9,000 shots in my career. I've lost almost 300 games. 26 times, I've been trusted to take the game winning shot and missed. I've failed over and over and over again in my life. And that is why I succeed."*

FEDERAL COURT DECISION ADDRESSES EXPRESS ENTRY DELAYS

By Colin R. Singer (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

A recent Federal Court decision has given clarity on the limits for Canadian immigration authorities when conducting lengthy security verifications on applications for permanent residence to Canada.

In the case of *Bidgoly v. Canada Citizenship and Immigration*, 2022 FC 283, challenging lengthy processing time due to ongoing security checks on an application for permanent residence under Express Entry by Canada's federal immigration authorities, Justice Paul Favel rejected Immigration, Refugees and Citizenship Canada's (IRCC) claim that processing was delayed due to an ongoing security check and COVID-19 related difficulties.

Justice Favel granted a judicial review of the matter and ordered Bidgoly's case to be processed within 90 days.

> "To rely on either the pandemic or the difficulties associated with security assessments, the Respondent is obliged to provide such evidence. Simple statements to the effect that a security check is in progress or that the pandemic is the reason for ongoing processing delays are insufficient."

The decision, dated March 1, 2022, also forces IRCC to provide more detailed, transparent reasons for lengthy processing delays on permanent residence applications — even during the COVID-19 pandemic.

In rendering his decision, Justice Favel stated: "To rely on either the pandemic or the difficulties associated with security assessments, the Respondent is obliged to provide such evidence. Simple statements to the effect that a security check

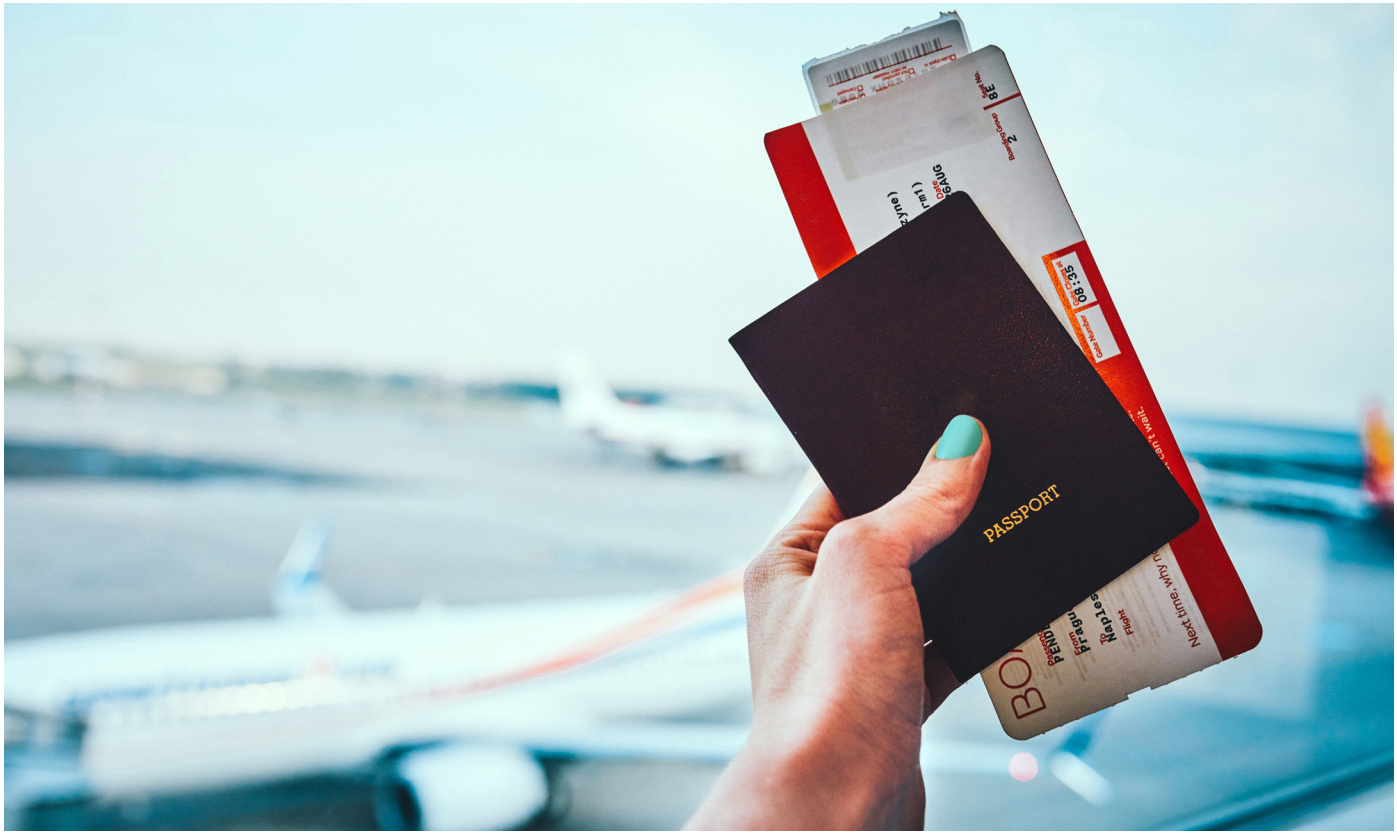
is in progress or that the pandemic is the reason for ongoing processing delays are insufficient."

TIMELINE OF THE APPLICATION

IT entrepreneur Siavash Mahmoudian Bidgoly (the applicant) first moved to Canada from the United States on a work permit in July 2018, with his spouse joining him a month later. He started his own company in September 2018 that employs residents of Canada.

After submitting a profile to the Express Entry Pool in April 2018, he received an Invitation to Apply four days later, then submitted his full permanent residence application, including his wife as a dependent, on July 22, 2018. By the end of August that year, his file had been determined complete by IRCC, a criminality check done and the application recommended for Canada's Federal Skilled Worker Program (FSWP).

Given the published six-month processing standard for applications via Express Entry, the case seemed to be progressing in a timely fashion. But then, nothing happened for nearly a year.



By June 2019, the applicant and his spouse's medicals had expired, meaning they had to be extended. In August the same year, the application was deemed to have met FSWP eligibility requirements. Despite appearing to be nearing a conclusion, the file was then referred for an admissibility assessment, which cannot be completed without a security screening.

All the while, the applicant asked about the status of his application several times via access to information and privacy requests and an online inquiry to the IRCC in July 2019. He was told only that "his request was forwarded to the appropriate office," court documents show.

From August 2019, the applicant began involving MPs, and in December discovered his spouse's security check was complete, but his was still in process. Several more follow-up requests were made, but each time Bidgoly was told the security check and application were still in process. By this time, Canada was in the grip of the COVID-19 pandemic, with restrictions first imposed in March 2020.

The applicant's argument was that since he had met statutory requirements, he had a right to be issued permanent residence, saying the delay had impacted the establishment of his startup business.

MINISTER'S POSITION AT THE HEARING

IRCC's representatives, the Ministry of Justice (the minister), rejected the applicant's arguments at the hearing, saying Bidgoly had "no vested right to permanent residency", and that the processing time was not unreasonable and justified given the delay of the security screening, which it blamed on "the lack of a working relationship with the Applicant's home country, Iran."

The decision also reports that the minister argued the delay "has not been longer than what is required," due to the impact of the pandemic, saying that "with the shutdown of government offices, the handling of security matters has become more complicated and limited."

FEDERAL COURT FINDS IN APPLICANT'S FAVOUR

In describing the IRCC's explanations as "unreasonable and unexplained", Justice Favel took particular issue with the lack of transparency and details in the respondent IRCC's reasons. On the security check argument, Justice Favel wrote: "A blanket statement to the effect that a security check investigation is pending, which is all that was given here, prevents an analysis of the adequacy of the explanation

altogether. And security concerns instead appear to be lacking as a result."

He also wrote: "Further, I reject the Respondent's submission that part of the delay is attributable to the lack of a working relationship with Iran. If the Respondent wished to rely on this argument, it should have provided evidence [...]".

Justice Favel comprehensively rejected the argument that the pandemic contributed to the delay, stating "I do not find the Pandemic to be a satisfactory justification," he wrote. He added: "In this case, there was already a delay of 19 months by March 2020. The delay was already unreasonable by the time the Pandemic began [...]".

Judge Favel continued: "[...] the impact of the Pandemic is not a satisfactory justification without more detail on how it has affected Express Entry applications."

He added: "The Pandemic has been a gradual part of life since March 2020, and processes have slowly resumed [...]. All institutions throughout Canada have also adapted to addressing backlogs and delays to varying degrees of success."

WHAT THIS MEANS FOR PENDING APPLICATIONS FACING LENGTHY SECURITY ASSESSMENTS

Applicants under the Express Entry immigration system incurring lengthy and/or excessive processing times due to a security assessment review may have a legal right to force IRCC to finalize its review in the absence of compelling findings that would point to a security risk or transparent difficulties it incurs in making such determination. Additionally, representatives in the province of Quebec, which has its own immigration program, may want to consider this decision as a basis to address the pending 29,000 applications for permanent residence, many of which are undergoing lengthy processing due to alleged security assessments.

Note: As there were no questions certified as part of this decision, the Federal Court of Appeal cannot be seized of the matter. This decision should therefore be considered as final.

Colin R. Singer is immigration counsel for ***www.immigration.ca****. He can be reached via Twitter:* ***@immigrationca****.*

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