

KEEPING CURRENT

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The judicial rant heard around the legal profession: a legal research lesson

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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As we approach the one year anniversary of Ontario's declaration of a state of emergency because of Covid-19 pandemic, the stresses and strains caused by the lockdown can be seen and felt everywhere, including in our justice system. In a recent blog, my colleagues highlighted a series of cases in which judges have commented about Covid's impact on the justice system and what they have been seeing and experiencing. The comments are meant to be instructive.

One of those cases is [Polgampalage v. Devani, 2021 ONSC 1157](#). In particular, [paragraphs 40-42](#) have received a lot of attention. In a conversation that I had last week with an Osgoode Hall Law School law professor and the law school's Dean, the subject matter of this case was discussed.

There is no doubt that Justice Myers' comments are filtering through the legal profession and the virtual hallways of law schools everywhere.

The case is about a party's motion to transfer a proceeding from one

jurisdiction to another. Such a motion is governed by [rule 13.1.02\(2\) of the Rules of Civil Procedure](#). Under this section, a transfer is permitted either where it is likely that a fair hearing cannot be held in the county where the proceeding was commenced or, where a transfer is desirable in the interest of justice, having regard to factors set out under [rule 13.1.02\(2\)\(b\)](#).

In [Devani](#), the motion was brought under [rule 13.1.02\(2\)\(b\)](#) and was supported by an affidavit sworn by a student-at-law rather than the client. Among other faults, the student's affidavit was based on hearsay evidence, contained legal argument best left for inclusion in a factum, and failed to provide evidence connected to the factors listed under [rule 13.1.02\(2\)\(b\)](#).

While the motion was not opposed by the defendant, Justice Myers dismissed it because there was no basis at all in the evidence to meet the rule's requirements.

The case has become noteworthy because in dismissing the motion His Honour expressed disappointment in the

fact that the student-at-law had been permitted to swear and submit the affidavit that supported the motion. Justice Myers stated that the student's principal should have provided closer supervision to the student and that greater care should have been taken to scrutinize its content.

From a teaching perspective, Justice Myers reminded the profession as follows:

...[A]ll students and lawyers...have independent duties to scrutinize with great care every word to which they put their names. During the pandemic in particular, juniors need to insist that they receive full instructions and their work product is properly reviewed. As difficult as it may be at times, junior lawyers and students alike must guard against allowing employers, clients, or anyone to put their integrity or reputations at risk by inadequate instructions or releasing inadequately reviewed material under their names.

This, of course, is sound advice.

However, this case also provides the following legal research lesson.

Today, there is a tendency for legal research to be conducted using CanLII for the sole purpose of locating and retrieving primary case law or statutes. Students, young lawyers and senior lawyers alike find using CanLII convenient when searching for relevant law by entering a search string into the "Document text" box, pressing the "Enter" key on their computer and "magically" receiving a list of cases that they might need to support a client's case. Secondary sources are forgotten, including precedent sources such as Williston and Rolls, Court Forms.

If the principal or the student-at-law had used these sources, *Devani* might not be a notorious case. The affidavit may have been sworn by the client and may have contained evidence connected to the factors in [rule 13.1.02\(2\)\(b\)](#) because those secondary sources would have alerted the reader to the leading cases on transfer motions and would have provided a template affidavit setting out the standard evidence that should be included therein in order to succeed on a such a motion.

My recommended approach to a transfer motion would have been to start with the 2020-2021 Ontario Annual Practice, by Carthy, Miller and Cowan (Thomson Reuters), or an equivalent text, and to have read the case annotations under [rule 13.1.02](#). There, I would have discovered more than three pages of annotated entries and the standard test considered by the court when determining a transfer motion.

I would then have supplemented this initial research by accessing the seminal secondary source on Ontario's *Rules of Civil Procedure*, Holmsted & Watson: Ontario Civil Procedure (Thomson Reuters: looseleaf) and reviewed the commentary written about [rule 13.1.02\(2\)\(b\)](#). Again, I would have discovered more leading cases and confirmed the appropriate test.

Lastly, I would then have searched for a precedent in Williston and Rolls, Court Forms (Lexis Nexis). In this secondary source, I would have discovered in Chapter 68 a template Notice of Motion, two template affidavits and a template court order, plus some useful commentary, to use when drafting materials for a transfer motion.

Both Holmsted & Watson and Williston and Rolls are available in hard copy and online through their respective publishers.



It is possible that neither the principal nor the student-at-law in [Devani](#) had access to these sources, especially since law libraries have been closed because of the pandemic and not all law firms subscribe to commercial online research tools or purchase specialized printed texts or looseleafs.

However the important take away is that secondary sources should never be overlooked when conducting legal research. Neither lawyers nor students need to re-invent the wheel. In a secondary source, an author has already vetted the law, generally cited the most relevant cases and/or provided a useful precedent.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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