

## Continued misuse of generative AI in Canadian courts

By **James R.G. Cook**

Law360 Canada (February 9, 2026, 2:49 PM EST) -- Despite several judicial admonishments in recent months, the unchecked use of generative AI programs for written submissions has continued in Canadian courts. Recently in Ontario, counsel responding to a motion to dismiss an action for delay filed a factum containing a quote purportedly from a Court of Appeal case that could not be found by opposing counsel or the motion judge. While the cited case existed, the quote that was reproduced in the factum could not be found. When pressed on the issue, counsel confirmed that while certain cases referred to in the factum existed, he did not verify their content by reading them: *RSR Road Surface Recycling v. Bonnechere Excavating*, 2026 ONSC 698.



James R.G. Cook



wildpixel: ISTOCKPHOTO.COM

Rule 4.06.1 of the *Ontario Rules of Civil Procedure* requires that factums include a statement certifying that the person signing the statement is satisfied as to the authenticity of every authority cited in the factum. In this case, the factum did not include this statement. The motion judge found that this failure to comply with Rule 4.06.1 was deliberate. The judge reserved the right to factor in this misuse of AI when receiving cost submissions from the parties. The factum itself was not relied upon by the court for the underlying motion.

In another avoidable yet perhaps inevitable decision, the Court of Appeal of Alberta imposed personal costs against a lawyer for using AI-generated submissions in his material filed: *Saroya v. Reddy*, 2026 ABCA 20. For the appeal, the appellant's counsel had filed a factum drafted by a contractor (another lawyer) using a generative artificial intelligence program that contained references to non-existent authorities. The respondent was required to address the issue of the non-existent cases relied upon in the appellant's factum.

Under Rule 10.50 of the *Alberta Rules of Court*, costs may be ordered payable by a lawyer personally "[i]f a lawyer for a party engages in serious misconduct."

The appellate court referred to the Supreme Court of Canada's directive that personal costs awards are appropriate only in "exceptional circumstances," where a lawyer's actions seriously undermined the authority of the courts or interfered with the administration of justice: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at paras. 26-29. An error or mistake in

judgment is not enough as there must at least be a marked departure from the standard of reasonable conduct or gross neglect: *Stoney v. 1985 Sawridge*, 2019 ABCA 243 at para. 44, citing *Jodoin* at para. 27.

The appellant's counsel argued that there was mixed success on the appeal result, which ought to be a key consideration in determining costs, and while he acknowledged the failure to verify authorities cited in the factum, he submitted that the "inadvertent use of AI hallucinations" should not attract a personal costs award against counsel. Rather, he argued, something more than mere error or inadvertence is required to impose personal costs against a lawyer.

As to the use of AI in particular, the appellant's counsel argued that AI was a new and emerging technology and there would be a "chilling effect on the profession" to impose personal costs based upon his inadvertent use of AI in the circumstances where there was not fraudulent or deceitful conduct on his part, or any intention to delay or obstruct proceedings. He submitted that an award of personal costs in this case would fail to draw differences between mere inadvertence and more serious misconduct.

The Court of Appeal did not agree with these submissions. The court noted that there is no denying that the use of AI is becoming "more prevalent in society," which led to the issuance in October 2023 of a Notice to the Public and Legal Profession by the Alberta courts, applicable to all lawyers and litigants, titled "Ensuring the Integrity of Court Submissions When Using Large Language Models." The notice was intended to reinforce the integrity and credibility of legal proceedings and, in the appellate court's words, "to ensure that litigants do not provide inaccurate or misleading information to courts and do not waste the time and resources of the judiciary and other litigants. The administration of justice demands no less."

The court noted that if the appellant's counsel had complied with the October 2023 notice and exercised caution, the issues regarding the non-existent authorities in the factum would not have occurred. Instead, the use of AI resulted in a misleading factum being filed with the court and led to a waste of time and resources. The appellate panel was required to assess the magnitude of the AI issue and associated submissions.

Further, the Court of Appeal did not agree that the case involved "mere inadvertence." In that regard, factums filed with the court were required to include a table of authorities with a hyperlink to each authority cited, or copies or extracts of any authorities for which a hyperlink is not available. Since this rule had not been complied with, nearly half of the cases listed in the appellant's table of authorities were non-existent. The use of a third-party contractor did not absolve counsel of the need to adequately review work prepared by someone else. It was, in the court's view, incumbent on counsel to check and correct any misleading information in a factum.

In the specific circumstances of the case, the Court of Appeal concluded that there was sufficiently serious misconduct to warrant an award of personal costs payable by the appellant's lead counsel. The failure to comply with the October 2023 notice and counsel's conduct in the events that followed constituted "a marked departure from reasonable conduct that seriously interfered with the administration of justice."

The amount of costs ordered by the appellate court was \$17,550, plus GST, which was reflective of the steps the respondent had to take, including the costs associated with making submissions to a case management officer, filing a supplemental factum to address new arguments, and providing further oral and written submissions with respect to the scope of the amended factum and costs to the Court of Appeal.

The ongoing takeaway from these decisions is that courts must be able to rely on counsel for the authenticity of authorities relied upon in their written submissions. One could envisage a situation where a busy motions court judge relies on a false AI-generated proposition of law to make a decision. Civil rules and practice directions are in place in an attempt to avoid these results but are only effective if followed.

The Ontario Superior Court of Justice has recently introduced a province-wide practice direction for the use of AI in court proceedings that states that the court will not tolerate inadvertence for filing non-existent cases, mischaracterizations of case law or fabricated quotations. If the use of AI to

generate fake case law persists in the profession, the consequences for lawyers may well be more serious than personal costs penalties.

*James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articulated there in 2002. As a litigator in the firm's dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

*Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at [Richard.Skinulis@lexisnexis.ca](mailto:Richard.Skinulis@lexisnexis.ca) or call 437-828-6772.*

---

All Content © 2003-2026, Law360 Canada