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Opening Addresses by the Defence

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Introduction

Many books and papers have been written about opening addresses. They address the applicable law. They also provide guidance on drafting opening addresses and some provide annotated examples. This paper is not intended to replicate or even summarize the discussions in these texts and articles. Hopefully, this short paper and the resources referred to in the next section will provide you with a starting point for your research when you are preparing your first opening address.

Following the resources section, I will briefly set out the basic law that applies to opening addresses. I will not attempt to summarize the recommendations of the leading authors on how to construct an effective opening address. I think you will find it much more instructive to read their texts and exemplar opening addresses. However, I have included a section entitled "Generally Accepted Rules Regarding Opening Addresses". This is not a discussion of effective techniques but rather a potpourri of issues that you should be aware of as you prepare your opening address. This is followed by a discussion of some of Geoffrey Adair's recommendations for defence opening addresses. The last section of this paper contains a summary of a few of the leading cases which provide specific examples of impermissible statements in an opening address.

Resources

The following is a quick list of resources that should be consulted by anyone who wants to read about opening addresses:

On Trial: Advocacy Skills, Law and Practice, (Second Edition 2004), Geoffrey D. E. Adair

Sopinka on the Trial of an Action (Third Edition), J. Kenneth McEwan

Addressing the Jury: Achieving Fair Verdicts in Personal Injury Cases (Second Edition), Roger G. Oatley

The Art and Science of Advocacy, John A. Olah

Barbara Legate's Standard Statements of Law, Chapter 6 Rules of Opening Statements

Trials: Strategy, Skills, and the New Power of Persuasion (Second Edition 2009), Thomas A. Mauet

There are many more resources and a number of papers can be found on this topic by doing a Google Search.

The Courts of Justice Act and the Rules

Whenever one has a question about procedure a good place to start looking for the answer is in the *Courts of Justice Act* and the *Rules of Civil Procedure.*

The only provision in the *Courts of Justice Act* which deals with addresses is section 118 which only applies to personal injury jury trials. It states:

In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages.

On a leave application to the Divisional Court the Honourable Mr. Justice Then indicated that no mention of damages should be made in an opening statement without first reviewing the issue with the trial judge and opposing counsel.[1] While I have seen comments made in closing addresses about the quantum of damages I have never encountered it in an opening address from either plaintiff or defence counsel.

Rule 52.07 deals with the order of presentation in jury trials. It reads:

52.07 (1) On the trial of an action with a jury, the order of presentation shall be regulated as follows, unless the trial judge directs otherwise:

1. The plaintiff may make an opening address and, subject to paragraph 2, shall then adduce evidence.

2. A defendant may, with leave of the trial judge, make an opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence.

3. When the plaintiff's evidence is concluded, the defendant may make an opening address, unless he or she has already done so, and shall then adduce evidence.

4. When the defendant's evidence is concluded, the plaintiff may adduce any proper reply evidence and the defendant shall then make a closing address, followed by the closing address of the plaintiff.

5. Where a defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff shall make a closing address, followed by the closing address of the defendant.

(2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.

(3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.

(4) Where a party is represented by a lawyer, the right to address the jury shall be exercised by the lawyer.

The general rule is that the defendant is not entitled to open unless the defendant intends to call evidence.[2] In fact, the defendant may be obliged to undertake to call evidence as a pre-condition to having a right to open. Geoffrey Adair has suggested that there may be exceptional cases where the defendant can open even if it does not intend to call evidence.[3]

You should also note that the defence has an option when to open. It may open, with leave, after the plaintiff's opening address, or after the plaintiff has closed its case. It cannot open twice.

Rule 52.07(2) gives the trial judge the right to reverse the order of presentation where the burden of proof on all matters in issue lies with the defendant. While there may be reverse onus provisions that affect liability issues it would be highly unusual in a jury trial for the onus on all issues to be on the defendant.

One court has also exercised its discretion to allow the non-party to a Mary Carter Agreement to open after the defendant that was party to the agreement. This was permitted because the settling defendant was perceived to have interests more clearly aligned with the plaintiffs. It was submitted that in these circumstances it would be unfair for the non-settling defendant's opening to be sandwiched between that of the plaintiff's and the settling defendant.[4]

Generally Accepted Rules Regarding Opening Addresses

As you already know one of the main purposes of the opening address is to give the jury an overview of the story (evidence) you are going to present once the plaintiff has closed their case. With this purpose in mind, I have summarized below a list of prohibitions that apply to opening addresses and a couple of additional matters you should consider when preparing an opening address.

First, you cannot mention inadmissible evidence. This obliges you to consider every single fact that you intend to mention in your opening address with a view to ensuring that you have admissible evidence of each fact. If you do not, then do not mention it. Some authors suggest that, at a minimum, you must have a good faith belief in the admissibility of the evidence. There is a risk that if you mention facts in your opening that you are unable to prove through admissible evidence, then there could be a correcting statement from the trial judge or a mistrial. Obviously, the plaintiff would need to demonstrate prejudice to obtain such a ruling but it is a definite risk. If you are unsure about the admissibility of any evidence, it may make sense to either drop it from your opening or to seek a ruling on admissibility before you open. In some situations the trial judge may be amenable to providing such a ruling. However, given that admissibility may well depend on what other facts are proven a judge may be reluctant to provide a ruling in advance of hearing the proposed evidence.

It follows that you cannot mention unprovable facts. If the only witness that can prove a fact is missing, then you cannot prove that fact and it should not be mentioned in your opening. If you are having difficulty locating a witness do not run the risk of a mistrial by mentioning the anticipated evidence of that witness in your opening. If the witness is critical, this might be a reason for choosing to open after the plaintiff has completed its evidence. This will give you more time to find the witness.

You should never state your personal opinion. Phrases like "I believe", "I know" and "I think" should not pass your lips during an opening address.

You cannot argue. Put somewhat differently, you cannot urge a particular verdict or conclusion on the jury during your opening address. Roger Oatley has suggested that this prohibition can be readily adhered to by just avoiding suggesting conclusions to the jury. In your opening, you can outline the facts that you intend to prove and if this is done correctly, then the jury, without your prompting, will reach the conclusion that you want it to.

For example, Roger Oatley notes that if you eliminate adjectives and adverbs you are more likely to avoid a complaint that you are arguing. The example he uses is that it is better to say that the defendant was driving at more than 25 km over the speed limit than to state that the defendant was driving recklessly.

Some texts suggest that you cannot mention your opponent's case during your opening. However, other authors suggest that this is permissible particularly if the other side has committed to a position in their pleading, in admissions or in its opening. You may well need to mention the other side's case if you intend to contrast the evidence you intend to call to that proposed by another party. However, it is a good idea to avoid a detailed discussion of the other side's case. You run the distinct risk of misstating their case which could also lead to correcting comments from the judge to the jury or, in cases of serious misstatement, a mistrial.

In some U.S. jurisdictions, in particular, if you fail in your opening to make out a prima facie case, then you run the risk of a non-suit. That does not appear to be the law in Canada.[5] However, it normally makes sense that you cover all the evidence you will need to obtain a judgment in favour of your client in the opening address.

Your opening should not appeal to the jury's sympathies or to its prejudices. The line of what is acceptable in this regard will be reviewed later.

It is permissible to mention a point of law in an opening address if the jury needs to be aware of the point to understand your case. However, any law being referred to should not be controversial. If I intend to mention a point of law I usually advise counsel opposite before I open. If counsel objects and I am not prepared to drop the issue, then I would seek guidance from the trial judge before commencing my opening address.

It is permissible to use demonstrative aids in your opening. However, those aids cannot breach the rules that apply to openings generally. For example, in *Hayes v Symington*[6] the trial judge

refused to allow plaintiff's counsel to use photos of the plaintiff's injuries in his opening address. In that case the judge concluded that the photographs would not assist the jury in understanding the case at that point but might do so at a later point with the appropriate foundation. The trial judge was particularly concerned that they might elicit the jury's sympathy at that point and might affect the jurors' decision making process.

The oft-cited test from *Whitford v Swan*[7] is that the demonstrative evidence must pass the following 4 part test to be used in an opening address:

1. Will counsel proposing to use the demonstrative aid undertake to prove it?
2. Is it likely relevant?
3. Is it likely to assist the trier of fact in understanding the case? and
4. Is there something unusually prejudicial about the demonstrative aid that would require it to be excluded?

It is good practice to provide other counsel with an opportunity to inspect your proposed demonstrative aids well before trial. This will give you a chance to modify the aids to satisfy legitimate complaints from other counsel. It will also likely allow you to discern their concerns and prepare arguments for a motion to determine whether the aid can be used in advance of your opening address.

Defence Opening Addresses

I am not going to even attempt to summarize the many excellent texts and articles that provide roadmaps to preparing effective opening addresses. A number of them are mentioned in the "Resources" section of this paper. However, I do want to spend some time outlining some of the recommendations made in Chapter 7 of Geoffrey Adair's book regarding opening addresses from defendants.

Mr. Adair asks whether it is better for the defence to open or for it not to open in front of a jury. He urges defence counsel to consider is whether they want to undertake to call evidence. If there is a reasonable prospect of a motion for non-suit, then the defence would not want to open immediately after the plaintiff. To do so would oblige the defence to call evidence which it cannot do if it intends to bring a motion for non-suit. In this situation the defence might be wise to defer its decision to open until after the plaintiff has completed its case.

Mr. Adair also suggests other situations where it may make sense for the defence to waive its right to make an opening statement. He suggests that it is only in relatively uncomplicated cases like motor vehicle accident that counsel would not want to open. In complex negligence matters such medical malpractice he suggests that the defence will usually want to open. While most texts, which tend to be geared to the plaintiff's opening address, extoll the virtues of opening Mr. Adair raises a number of cogent considerations about whether making an opening statement is always a good idea. This commentary, from one of the most experienced trial

lawyers in the country, should be considered by any defence counsel before the decision is made to make an opening address.

There are two specific situations where I personally would consider not opening. The first is discussed by Mr. Adair. If the plaintiff has a real problem that its counsel has not adverted to in the opening and which will become apparent early in the plaintiff's case, then the defence may wish to waive its right to open. The example used by Mr. Adair is where the plaintiff was impaired before the collision and this was not mentioned in the plaintiff's opening. It may be more effective to bring this defence out in cross rather than telegraph it in an opening address.

The second is an even more unusual situation and I have encountered it just once. If your review of the list of witnesses being called before trial leads you to believe that the plaintiffs will fail to prove a vital element of their case, then you may decide not to open immediately after the plaintiffs. On the one occasion where I suspected this would occur I decided not to open after the plaintiffs did. I was concerned that in my opening I might tip the plaintiffs to their oversight. In that case, the plaintiffs failed to prove the vital fact and waiving my right to open at the beginning of the trial was the correct choice.

In fact, in that case I did open but after the plaintiff finished its case. I pointed out their oversight in my opening. I probably should not have opened at all. By mentioning the problem in my opening I opened the door for the plaintiffs to re-open their case. If I had waited until my closing address to raise the oversight, it would have been more difficult for the plaintiffs to re-open their case. In this case, I got lucky and the plaintiffs did not re-open their case. They lost the trial largely, in my opinion, due to their failure to prove this critical element.

Mr. Adair also suggests that unless a second or subsequent defendant needs to outline some particularly unique facet of the defence, then those defendants may not wish to open after the first defendant has opened.

Mr. Adair has a number of other suggestions for defence counsel regarding opening addresses in Chapter 7 of his book. They should be standard reading for all defence counsel.

One of the major questions faced by defence counsel is how detailed an overview of the facts they should provide in the opening address. Clearly, you do not want them to be so detailed that there is nothing for the jury to look forward to when listening to the evidence. Second, if you are going to mention a fact, then make sure that you can readily prove it. There is nothing more depressing than listening to your opponent, in their closing address, listing in detail the facts that you promised to prove but did not.

You should run through the evidence of each witness after you have prepared your opening address to make sure you can get each witness to provide the needed facts to support your opening address. If during that preparation you run into difficulty getting the witness to testify to the needed fact(s), then you may need to amend your opening address by dropping reference to the problematic facts. Obviously, if you cannot get the witness to testify about facts that are critical to your client's case you have a much more significant problem to deal with than

unproven facts in your opening. Those problems have to be fixed before the trial starts. However, I have often run into difficulty getting witnesses to provide some of the background and colour I would like to mention in my opening. When I have concerns in that regard I drop the mention of such facts from my opening address. Hopefully, I will be able to get the witness to provide the background and colour in their testimony. I can than incorporate it into my closing address.

Finally, if you feel that the other side's opening address has crossed the line in any way, then you should object to it after the opening is finished in the absence of the jury. If you do not, then you may find that an appeal court will not interfere even if the opening did transgress some of the rules.

Cases on Improper Opening Addresses

In this section I want to draw your attention to a few cases that have discussed what you should not say in your opening address.

Ivanovski v Gobin[8]

This was a leave application from the decision of a trial judge declaring a mistrial for making an inflammatory opening statement. Justice Then concluded that there were no grounds to grant leave. The cumulative effect of the following inappropriate statements in the plaintiff's opening led to the mistrial:

1. You should not suggest that defence counsel is quite skilled and may attempt to use smoke and mirrors;
2. It was inappropriate to refer to the plaintiff's first party (accident benefits) insurers, as the inescapable inference from such submissions to the jury was the Defendants' insurers were in the wrong;
3. It was inappropriate to suggest an appropriate quantum of damages to the jury in opening without having addressed this issue beforehand with the trial judge in the presence of opposing counsel; and
4. It was inappropriate to state that the Defendants have refused to accept any responsibility or refused to pay any compensation to the Plaintiffs.

The trial judge found these statements to be prejudicial to the defence. In this case the trail judge refused to consider correcting instructions because they would not undue the prejudice. Additionally, they might cause the jury to form a negative opinion of the plaintiff or their counsel.

In a number of cases, plaintiff's counsel have run into trouble for commenting on the defendant's failure to accept responsibility for the accident. Statements such as this are considered to be attempts to move the burden on of proof on the issue of liability from the plaintiffs to the defence. They always attract harsh criticism.

Trypis v Lavigne[9]

This decision provides a broad overview of when a judge should intervene after an opening address has been complained about. However, the appendix to the decision is of more assistance as it outlines the transgressions by counsel and what the appropriate correcting directions were.

You may well indicate what the jury's role is and, in particular, that the jury is the sole judge of the facts in the case. However, you should not state that "You are the judicial system in this case."

Counsel should not urge the jury to take sides by stating that "You have the power to decide justice between Phil Trypis and his family on the one hand and the Lavigne family on the other hand, it's your power."

Counsel should not urge a jury to right a wrong. It is inflammatory as it is an appeal to emotions and to sympathy.

A defence counsel who tells the jury that they are being asked by the plaintiffs to pay hundreds of thousands of dollars is improperly playing to the jury' sympathy. It also suggests that there may not be insurance and that the personal assets of the defendant are at risk. It invites the jury to consider ability to pay which is an irrelevant consideration.

Finally, Justice Lauwers implied that failing to preface factual assertions with phrases such as "You will hear evidence" or someone "will say" may be problematic as it tends to make the lawyers assertions sound like they are evidence. I absolutely hate using these phrases continually during my openings as they simply detract from the storytelling. I usually put such a statement the beginning of my opening. It attempts to clarify that what follows is the evidence I anticipate they will hear and that my assertions are not evidence.

Schram v Osten[10]

This case discusses in detail the reasons why plaintiff's counsel must not make assertions which suggest that one or more of the defendants are liable. Such statements can be interpreted as reversing the onus on the question of liability. Statements such as the defendants have failed to accept their share of the responsibility are simply improper. This case suggests that outlining what the other side's witnesses are going to say is dangerous. It also suggests outlining what you expect to bring out in cross-examination is also problematic. Demonizing a defendant with a statement like "A motorcycle is mobile and dangerous and motorcycles try to gain an advantage in rush hour…" is really an attempt to play to prejudice and probably constitutes an expression of counsel' s opinion.

Brochu v Pond[11]

In this medical malpractice case counsel for the defendant found herself in trouble for comments she made in her opening and closing addresses to the jury. The following statements were complained about at trial and on the appeal:

1. This case is really about taking a stand against cases that are frivolous, that are undermining our health care system;
2. This case is about supporting medical doctors in your community who are working hard, like Dr. Pond does, to try to service their patients as best as they can;
3. The plaintiff is blaming and trying to pin the blame on Dr. Pond for the injury;
4. Dr. Pond was required to continue his practice during the trial or he would "put his own patients-obstetrical patients and ill women at risk of their health" by being required to attend at trial; and
5. Dr. Pond is "one of only two obstetrician/gynecologists in Timmins".

The lower court provided correcting instructions to the jury about these comments. The Court of Appeal pointed out that some of the statements really expressed the opinions of counsel and invited the jury, as representatives of the community at large, to curtail unmeritorious malpractice suits and to protect an endangered health care system. These comments appeal to the emotion and fears of the jurors and urged them to consider factors irrelevant to the basic issues in the case. The Court also criticized some of the statements made by plaintiff's counsel in her opening address. The Court of Appeal concluded that the correcting instructions of the trial judge were sufficient and refused to declare a mistrial.

Brophy v Hutchinson **[12]**

In this case the British Columbia Court of Appeal indicated that it is improper in an opening to comment directly on the credibility of witnesses, to use argument, rhetoric, sarcasm, derision and the like. Accordingly, referring to the plaintiff as a drug dealer was highly prejudicial and improper. Referring to him as a high school dropout and not gainfully employed was relevant to the issue of damages. However, as no evidence had yet been adduced these comments took on an argumentative quality. The decision goes on to criticize a few other statements in the defendant's opening address. In particular, the Court was critical of a request that "I want you to consider yourself being in the defendant's position". The use of the word "want" was improper and the jury should not be asked to place themselves in the defendant's position. This statement was calculated to divert them from their proper role as impartial arbiters between two adversaries.

Chilton v Bell Estate **[13]**

Plaintiff's counsel opened by asking a jury to consider the horror, surprise and helplessness of facing a driver pulling out to pass at highway speeds. This was considered an invitation to excite emotions and was found to be improper.

Language which casts the defendant as the villain is improper. In this case at the closing of the opening address counsel for the plaintiff indicated that the defendant set the circumstances in motion, was responsible for the crash and that he would be asking the jury to give fairness and justice.

Counsel was also admonished for detailing evidence from the other side that he was not going to call.

The court granted a mistrial because the trial judge did not think judicial instructions could remedy the harm.

Hall v Schmidt[14]

A number of statements made during an opening address by plaintiffs' counsel in a fatality claim where liability was admitted were commented on before the trial judge ordered a mistrial.

"This case is about a defendant driver, who negligently, on May 14th, 1997 causes a collision who kills Ben and which forever changes the lives of his family members. The proceedings in this courtroom are an opportunity for us, the justice system, to confirm the value of Ben's life to those family members who survived him". Justice Ferguson indicated that this statement misinformed the jury regarding its duty which was not about the defendant's negligence. The two sentences were found to appeal to the sympathy and emotion of the jury for an irrelevant reason. The also appear to invite the jury to punish the defendant rather than compensate the plaintiffs for their loss.

"It is a special honour for me today to speak for Ben because Ben is no longer with us." This was found to be inflammatory and to mischaracterize the role of counsel.

"We are here because the defendant has refused to accept that Dave Hall was really a father figure to Ben and that he looked upon Dave Hall as his father. Counsel was criticized for making statements that suggests certain facts have been proven which have not. This is also referred to as a mischaracterization of the burden of proof. It also suggests that it is improper that the defendant has not conceded this fact.

His Honour further criticized passages where counsel invited the jury to value Ben's life. Its real job is not to value his life but the plaintiff's loss of care, guidance and companionship. His Honour indicated that this passage was designed to blur this distinction.

Justice Ferguson then made this comment:

If the remarks of counsel do not consist of mentioning evidence which will be called, of mentioning a point of law in issue, or an explanation of how the anticipated evidence will relate to an issue, then they are irrelevant and probably constitute argument.

Justice Ferguson indicated that counsel should not discuss their experience or lack of experience in their opening addresses. His Honour also indicated that counsel should not put his or her integrity in issue in an opening address. It is also impermissible to ascribe an improper motive to either defence counsel or their clients when counsel is simply performing their duties as counsel. This comment was considered to breach this rule: "I fear that the defendant will try and put them on trial, may try and minimize the losses they have suffered…"

There are a number of other criticisms of counsel's opening address in this case.

Elder v Rizzardo Bros. Holdings Inc.[15]

This is an interesting case as the judge in this case was not as inclined to find fault with some comments that other judges might have criticized.

His Honour found that statements that “Not surprisingly we don’t agree with much of what Mr. Romaine said in his opening statement”, “We don’t’ believe the plaintiff’s version of events” and “We do not agree on how or why the plaintiff fell” were not problematic. His Honour conceded that the use of “we” tends to implicate counsel’s opinion but he concluded that these were nothing more than a broad outline of the defence position. His Honour had no concern with the statement “that it is a common sense inference that people often fall in Canada during the winter”.

Hoang (Litigation Guardian of) v Vicentini[16]

In this case a number of statements made in the opening address were attacked by 3 defence counsel. The combination of inappropriate statements by plaintiff’s counsel resulted in a mistrial.

Plaintiff’s counsel was first found to have suggested that a reverse onus applied to all 3 defendants when it only applied to one of them. Plaintiff’s counsel also ran into trouble for suggesting that a witness would provide evidence on an issue the trial judge had already ruled he could not provide. Counsel also ran into difficulty for reading in a discovery answer which was inadmissible and suggesting it was an unequivocal admission when it was not.

Burke v Behan[17]

Again a plaintiff’s counsel ended up with a mistrial for making a number of inappropriate statements in his opening address. He pointed out that damages are the only means we have of expressing the sympathy and humanity of society. The trial judge noted that this statement was fundamentally incorrect and that sympathy plays no role in damage assessment.

He got into trouble for stating: “I think it’s fair to say from my perspective and I believe society, that the companionship between a parent and child is fundamental. It’s fundamental to our society.” It was criticized as injecting a personal viewpoint and His Honour indicated that it is not the jury’s duty to recognize and protect the relationship.

In another statement counsel stated:

Linda was an only child…Linda’s mother…was 75 years old at the time of this accident. If any of you have grandparents or senior parents, there’s also a sense of guidance at that phase of an individual’s life, to help them through the stresses that modern society is now creating for all of us.

These comments were found improper on 3 fronts. They invited the jurors to take into account their own family situation, he gives evidence about grandparents or senior parents needing guidance and he also gives evidence that modern society is creating stresses for all of us.

He also criticized plaintiff's counsel for saying "I have the honour of representing the plaintiffs". His Honour notes that this suggests the plaintiffs occupy some special place in the litigious environment or that there is something special about their claims.

I must admit that I have made statements somewhat similar to those critiqued in the above two paragraphs. I suspect if he had not lapsed into argument repeatedly, used inflammatory language, made an incorrect statement that this would be his only chance to address the jury and his mention of criminal proceedings (all of which are criticized later in the judgment) that the statements in these two paragraphs would not have led to a mistrial.

He got himself into trouble for an argumentative opening predominately because he suggested the conclusions that the jury should draw from the evidence. The words "pushed violently forward" and "the pickup careened off" were found to be inflammatory.

Finally, he got himself into serious trouble by talking about the criminal proceedings and the differing burdens of proof between the criminal and civil proceedings.

These are by no means all of the cases that have addressed the topic of inappropriate comments in opening addresses. Hopefully, these summaries will provide you with the flavour of the cases in this area. My suggestion is that you should be careful to not fall afoul of these "rules" as the penalties can be quite significant.

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[1] *Ivanovski v Gobin*, [2003] O.J. No. 2053

[2] *Walker v Delice* (2001), 54 O.R. (3d) 70 per Feguson J. at 74

[3] See *On Trial* referred to under "Resources" at page 41.

[4] *Resch v Canadian Tire Corp*., 2006 CarswellONt 3760

[5] *King v Hommy (1962)*, 39 W.W.R. 209 at 216 (Alta C.A.)

[6] 2015 ONSC 7349 (SCJ)

[7] [1995] O.J. No 4189 (Ont. Gen. Div.)

[8] [2003] O.J. No 2053 (application for leave to the Divisional Court)

[9] 2009 CarwellOnt 2867 (per Lauwers J. as the then wasJ)

[10] 2004 BCSC 1789.

[11] 2002 CarswellOnt 4334 (C.A.)

[12] 2003 BCCA 21.

[13] 1998 CarswellOnt 4843 (per Donnelly J.)

[14] 2001 CarswellOnt 3899 (per Ferguson J.)

[15] 2016 ONSC 7098

[16] 2012 ONSC 1067

[17] 2004 CarswellOnt 5535