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THE IMPORTANCE OF DECISION MAKER EMPATHY & RESPECT

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Shadow of the Law Publications

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ABSTRACT

The way that decision makers treat those who appear before them influence perceptions of the delivery of justice. This paper considers the impact of the mispronunciation of an Indigenous Nation by the Supreme Court of Canada and applies both John Travolta's famous mispronunciation at the Academy Awards and the John Wayne worldview to call on adjudicators at all levels to consider the procedural experience of those they offer justice to.

ABOUT THE AUTHOR

Marc Bhalla, LL.M. (DR), C.Med, C.Arb (he/him) [biracial] offers this short paper inspired by his involvement as a non-Indigenous academic partner of *The Authentic Allyship Project* (www.authenticallyship.ca) and preparations for the forthcoming ALDR 6305: In Search of Reconciliation Through Dispute Resolution post-graduate law course that he co-presents at Osgoode Hall Law School.

Marc is accredited as a trainer by the ADR Institute of Canada and the Law Society of Ontario, is faculty of the Canadian Collaborative for Engagement & Conflict Management and has lectured at Queen's University, the University of Alberta and the University of Saskatchewan. He also lectured at many of Osgoode Hall Law School's professional development, post-graduate and undergraduate dispute resolution programs, including ADLR 6300: Introduction to Dispute Resolution, ALDR 6299: Teaching, Training and Coaching in Conflict Analysis and Dispute Resolution, ADLR 6303: Dispute Resolution in the Digital Age, The Osgoode PD Certificate in Online Dispute Resolution, The Advanced Certificate in Adjudication for Administrative Agencies, Boards & Tribunals and the Osgoode Mediation Clinical Program.

Marc has been widely published. Beyond this journal, he has contributed to the McGill Journal of Dispute Resolution, the Journal of Arbitration and Mediation, the Canadian Arbitration and Mediation Journal and has written two books – *The Art of Role Play in Dispute Resolution Training* (2020) and *ODR: Yesterday. Today. Tomorrow.* (2022).

Marc applies practical experience as a mediator and arbitrator to his academic research and teaching. His passions include access to justice, inclusion and authentic reconciliation efforts.

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INTRODUCTION

To someone pursuing justice, their outcome will be of primary interest; however, experiencing justice involves more than receiving appropriate closure.¹ Research has found that parties to adversarial proceedings are more likely to accept their outcome, even if it is unfavourable, if they feel heard and that the process was fair.^{2,3} This suggests that one's experience participating in justice-seeking impacts their perceptions of if they receive justice.⁴

From the demeanour of intake clerks to the tone of opposing counsel, the decision maker alone does not impact the justice-seeking experience; yet, the behaviour of the adjudicator is clearly significant. This extends beyond the rendering of the decision in an efficient, unbiased and appropriate manner. It includes how adjudicators treat parties appearing before them. Being rude, disrespectful or disinterested should not be within the common behaviour patterns of contemporary decision makers. Adjudicators should demonstrate empathy and respect in offering justice.

THE KTUNAXA NATION EXAMPLE

On December 1, 2016, the Supreme Court of Canada heard the case of *Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation v. Minister of Forests, Lands and Natural Resource Operations, et al.*⁵

¹ John C. Kleefeld et al, ed, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2016) at 703. “[P]rocedural justice refers to the perceived fairness of procedures and/or processes.”

² Julie Macfarlane, *The New Lawyer: How Clients Are Transforming The Practice of Law*, 2nd ed (Vancouver: UBC Press, 2017) at 60. “[T]he experience of *how* a result is reached is often as, or even more, important than the substantive “rightness” of the outcome itself in fostering a sense of fairness or justice amongst participants.” [emphasis in original].

³ Colin Rule, “Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit for Investing in Dispute Resolution” (2012) 34 UALR L. Rev. 767 at 772-775.

⁴ Ronald W. Staudt & Paula L. Hannaford, “Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers” (2002), 52 Syracuse L. Rev. 1017 at 1018.

⁵ Supreme Court of Canada, *Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation v. Minister of Forests, Lands and Natural Resource Operations, et al.* (British Columbia) (Civil) (By Leave) 36664, 01 December 2016, online: <<https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=36664&id=2016/2016-12-01--36664&date=2016-12-01&fp=n&audio=n>>.

Thirty-five seconds into the video feed, the fourth word spoken by Chief Justice Beverley McLachlin starts to introduce the case. The Chief Justice pronounces the Indigenous Nation involved in the case, Ktunaxa Nation, as *kut-an-axe-ah*. That is nowhere close to how Ktunaxa Nation is pronounced, *k-too-nah-ha*.

What message is sent by the mispronunciation?

Does it matter that Ktunaxa Nation has occupied the lands adjacent to the Kootenay and Columbia Rivers and the Arrow Lakes of British Columbia for more than 10,000 years?⁶

JOHN TRAVOLTA

A more famous example of botched pronunciation occurred beyond the court room. At the 2014 Academy Awards, John Travolta was tasked with introducing Idina Menzel. Travolta introduced her as “Adele Dazeem”, getting both Menzel’s first and last names very wrong. This incident went viral, inspiring the term “*Travoltify*” and the creation of a widget in which you could enter your name to find out how John Travolta would mispronounce it.^{7,8} Given Idina Menzel’s popularity at the time, it was difficult to comprehend how Travolta was both unfamiliar with how to pronounce her name and unable to easily learn how to pronounce it.⁹ The incident reflected a lack of courtesy and effort.

Superficially, Chief Justice McLachlin’s mispronunciation of Ktunaxa Nation may not seem like a big deal. Many coming across the Nation’s name for the first time may sound it out the same way. It possibly might not even offend some within the Ktunaxa Nation to have their name mispronounced by a non-Indigenous person. That is not the point. The point is that a person’s procedural experience is impacted by how the decision maker treats them.

⁶ Ktunaxa Nation, “Who We Are”, online: <<https://www.ktunaxa.org/who-we-are/>> [perma.cc/9DRB-PS3X].

⁷ Ann Oldenburg, “Try the John Travolta name generator” *USA Today*. 2014 March 04, online: <<https://www.usatoday.com/story/life/people/2014/03/04/try-the-john-travolta-name-generator/6010799/>> [perma.cc/T4WP-8B4E].

⁸ Jim Festante and Chris Kirk, “The Adele Dazeem Name Generator - Use our widget to Travoltify your own name” *Slate*. 2014 March 03, online: <http://www.slate.com/articles/arts/low_concept/2014/03/john_travolta_called_idina_menzel_adele_dazeem_what_s_your_travolta_name.html> [perma.cc/A5G6-XMAP].

⁹ Based on the popularity of the film *Frozen* that she starred in following great success on Broadway.

At one minute and nineteen seconds into the webcast, Chief Justice McLachlin completes naming several legal representatives involved in the hearing. She then states that she apologizes *if* she mispronounced any names.¹⁰ Her statement seems to be directed at legal counsel. It is also stated after Chief Justice McLachlin mispronounced Ktunaxa Nation a second time, not even one and a half minutes into the proceeding.

In a diverse nation, many people of different cultures can be expected to find themselves seeking justice. It is unfair to expect an adjudicator to be familiar with how to pronounce the names of all who appear before them. That does not mean that decision makers cannot ask or acknowledge the limits of their knowledge. Intentionally or not, the lack of care given to the proper pronunciation of Ktunaxa Nation spoke volumes.¹¹

JOHN WAYNE

*“You know in all those movies you never saw John Wayne's teeth?
Not once, I think there's something wrong when you don't see a guy's teeth”
– Victor Joseph (Smoke Signals)*

There is a classic scene in the award winning 1998 film *Smoke Signals* in which the two primary characters, who are Indigenous, discuss western films on a bus, after being relocated from their seats by racists.¹² They debate if cowboys always win in western movies and focus on John Wayne, the “toughest cowboy of them all”. It is suggested that John Wayne would never show his teeth, “[h]e could never smile because smiling for him was a sign of weakness”.¹³

¹⁰ Michael Franck, “Toward a Bias-Free Justice System” (1990) 69 Mich. B.J. 366 at 366.

¹¹ nupqu ʔa·kʔaʔm (@Skink00ts), “Truth be told, former Supreme Court of Canada Chief Justice Beverly McLachlin is no friend or symbol of truth for Ktunaxa. I was in her court when she wouldn't pronounce Ktunaxa correctly & her ruling justified the destruction of our sacred site as something we would get over.” 2020 September 24. 7:50pm. Tweet. Online: <<https://twitter.com/Skink00ts/status/1309279049181614080>> [perma.cc/4VAS-XVR7].

¹² Joanna Hearn, John Wayne's Teeth: Speech, Sound and Representation in “Smoke Signals” and “Imagining Indians” *Western Folklore*, Summer - Fall, 2005, Vol. 64, No. 3/4, Film and Folklore (Summer - Fall, 2005), pp. 189-208, online: <<https://www.jstor.org/stable/25474748?mag=what-smoke-signals-means-20-years-later&seq=1>> [perma.cc/D3QP-X2DN].

¹³ Monica Reiser, “John Wayne's Teeth” Grinds Up Eurocentrism in a Brotherhood Movie.” *ENGL 359: Gender and Diversity in Film*. Xavier University. (Fall 2016), online: <<https://xuengl359.wordpress.com/home/film-analysis-blog-posts/john-waynes-teeth-grinds-up-eurocentrism-in-a-brotherhood-movie-by-monica-reiser/>> [perma.cc/XLK7-NM3H].

The symbolism around John Wayne's teeth demonstrates "toxic masculinity" – a macho worldview of toughness as power and meanness embedded within authority.¹⁴ Caring is displaying susceptibility, kindness is weakness and "pride" prevents one from asking for direction.¹⁵ In this worldview, there is hesitancy to acknowledge the limits of one's knowledge. Never expose your vulnerability by expressing self-awareness of your limits.

For generations, the prevailing sentiment was that decision makers had free rein to be rude. Adding anxiety to appearing before an adjudicator was the risk of harsh treatment, including finding yourself on the receiving end of what is known as a "judge slap".¹⁶ Judicial bullying and intimidation tactics were excused as a means to maintain the integrity of the justice system and to ensure matters before the court or tribunal were considered seriously.

Glimpses of a shift have appeared more recently, including a judge's attempt to humiliate a lawyer backfiring in Saskatchewan and an Alberta judge not being re-appointed because of the way they treated people in court.^{17,18} It is not appropriate for decision makers to "show their teeth" through verbal abuse or disrespectful behaviour.

¹⁴ One powerful exploration of this concept is offered in the song *Johnny's Teeth*, by the Indigenous hip hop artists known as Snotty Nose Rez Kids. While the reader is warned that the song contains explicit lyrics, it highlights social activism within Indigenous Communities. The song can be found with an Internet search of its title/artist and on popular music streaming services.

¹⁵ There is also potential application of other Academy Awards incidents to this discussion that extend beyond the focus of this paper, including the John Wayne-Sacheen Littlefeather incident of 1973 show and the Will Smith-Chris Rock incident of 2022.

¹⁶ A decision maker mocking, negatively commenting or otherwise putting down an advocate or party to a proceeding. The kind of behaviour that made Judge Judy famous.

¹⁷ Marc A Bhalla, Contemporary Considerations of Decision Maker Bias, 2020 1 *Journal of the Canadian Collaborative for Engagement & Conflict Management* 77, 2020 CanLIIDocs 3642 at 90-91, online: <<https://canlii.ca/t/t2rp>> [perma.cc/NP3N-K72L]. Saskatchewan Justice Danyliuk's 2021 viral incident stemming from misinformation giving rise to inappropriate behaviour.

¹⁸ Jonny Wakefield, Former Hinton Judge Let Go Over 'Rude and Bullying' Behaviour Loses Bid For Reappointment, *Edmonton Journal*. 2021 June 26, online: <<https://edmontonjournal.com/news/local-news/judge-denied-attempt-at-reappointment>> [perma.cc/XZ4H-RB5U].

CONCLUSION

*“Sometimes I think people fail to realize a judge is literally just some guy.”*¹⁹
– Muna Mire

We should not lose sight of the importance of the humanity of decision makers. Adjudicators should not be expected to know how to pronounce the names of all who appear before them, or not to get frustrated by the antics of some parties. No decision maker is all knowing and it is unfair to expect them to present themselves as Oz, the Great and Powerful.

On May 20, 2021, the Council of Canadian Administrative Tribunals presented a webinar on practical steps for *Advancing Truth and Reconciliation in The Tribunal Context*. Consideration was given to actions that adjudicators could implement in support of inclusion. Many insights were shared that apply to interactions with both members of Indigenous Communities and other cultures. Chief Halie (Kwanxwa'logwa) Bruce, J.D. stated:

“Cultural competency is not just discrete skills or knowledge. We need to be self-aware... The expectation is that you would be open and willing to learn and ask for help from Indigenous Communities if you don't know.”²⁰

This speaks to the importance of inclusion, proactivity and involving Indigenous Peoples in efforts related to reconciliation. Applying this message to the delivery of justice, decision makers at all levels - in both the public justice system and private practice arbitration - must take greater care to consider the experience of those appearing before them in appreciation of the fact that how they treat parties will impact their service of justice. Adjudicators must be open to accepting insight on how to treat those appearing before them appropriately. It is not a sign of weakness, ignorance or vulnerability to make an effort to get it right; to move beyond conditional apologies and to prioritize empathy and respect.

¹⁹ muna (Muna_Mire), “Sometimes I think people fail to realize a judge is literally just some guy.” 2021 November 11. Tweet. Online: <https://twitter.com/muna_mire/status/1458791744942792704> [<https://perma.cc/7QV2-PGUW>]. In no way if the “some guy” reference intended by the author to suggest that all judges should present as male.

²⁰ Myrna McCallum, Chief Halie (Kwanxwa'logwa) Bruce, J.D., Harry LaForme, Sarah Morales & Amber Prince, *Advancing Truth and Reconciliation in the Tribunal Context: Practical Steps*. 2021 May 20. Zoom at 30:04, online: <<https://www.youtube.com/watch?v=xBWKfKgtuyw>>.