Abstract geometric lines in the top left corner, consisting of several thin, light brown lines that intersect to form various polygons and triangles, creating a complex, layered pattern.

HOW TO SEA THROUGH THE NOISE: CULTURAL COMPETENCE IN DECISION WRITING

JUSTICE MOHAN SHARMA, SUPERIOR COURT OF JUSTICE

3 PARTS

1. ME

2. JUDICIAL CULTURAL COMPETENCE –
HISTORY, THE SHIFT, WHY & HOW

3. IT'S A MATTER OF PERSPECTIVE. CULTURAL
COMPETENCE IN THE LIFE OF A JUDGE

PART I: ME

- ½ Indian; ½ Danish = 100% Canadian
- Experience of being “othered”
- Role in Office of the Chief Justice for 13 years
- Witnessed evolution of judging

PART II: JUDICIAL CULTURAL COMPETENCE

- HISTORY, THE SHIFT, WHY & HOW

RECOGNIZE THESE PICTURES?



ANSWER:

- DAMAGE CAUSED BY HURRICANE FIONA, Maritimes
Canada

September 2022

Death Toll: 31

HOW ABOUT THESE?



ANSWER:

- DAMAGE CAUSED BY FLOODS, Pakistan
- EARLY OCTOBER 2022

Deaths: 1700

Affected: 33M people, including 16M children

Displaced: 8M people

CONSIDER

HURRICANE FIONA

Media coverage in relation to impact

N. America's contribution to greenhouse gas:
~15%

FLOODING IN PAKISTAN

Media coverage in relation to impact

Pakistan's contribution to greenhouse gas:
< 1%

WHY DO WE CARE MORE ABOUT FIONA VS. FLOODS IN PAKISTAN?

Pakistan is responsible for less than 1% of global greenhouse gas emissions, yet it is paying a greater price for man-made climate change for which N. America bears greater responsibility.

Is it *just* that we care less?



WHY IS OUR PSYCHE NUMB TO
EXPERIENCE OF OTHERS?

“HUMANS ARE EVOLUTIONARILY DISPOSED TO
CARE ABOUT AND LOOK AFTER BOTH
OURSELVES AND THOSE TO WHOM WE ARE
RELATED”

COLIN ELLARD, PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF WATERLOO
QUOTED IN CBC NEWS ARTICLE, “WHY ARE WE INDIFFERENT TO THE
SUFFERING OF MILLIONS? THERE’S A TERM FOR THAT” OCT 27, 2022

WHAT DOES THIS SAY ABOUT US AS ADJUDICATORS?

Hardwired to care about
those:

Like us?

Challenged to care about
those:

Unlike us?

CJC ETHICAL PRINCIPLES – A SHIFT?

1. Then (2004)
2. Now (2021)
3. What drove the shift?
4. Consequences of failing to learn culturally

THEN: CJC ETHICAL
PRINCIPLES (2004)-
ENCOURAGE COMMUNITY
INVOLVEMENT

“.. Neither the judge’s personal development nor the public interest is well served if judges are unduly isolated from the communities they serve.”

BUT...RESTRAINT IN CJC PRINCIPLES (2004)

“...This is good for the community and for the judge, **but carries certain risks.** ...it is important to address the question of the **limits that judicial appointment places upon the judge’s community activities.**”

“...precise constraints are **controversial** inside and outside the judiciary.”

“...may, in some cases, **jeopardize the perception of impartiality or lead to an undue number of recusals**”

ENGAGE IN
COMMUNITY

But there are limits on judicial engagement in the community

GOOD FOR JUDGE

But may challenge judge's impartiality and lead to recusals

GOOD FOR
COMMUNITY

But no specific reference to marginalized communities or diversity of Canadian communities. **Suggests judges not engage with groups that regularly appear before the court.**

RESULT: Judges less likely to participate in activities of marginalized communities for fear they would be considered “political” or to question the judge’s impartiality?

TENSIONS

THE SHIFT (2021): A DUTY TO LEARN: CJ WAGNER SAID:

“Cultural competence is critical to access to justice, and the rule of law. Judges are **encouraged** to take advantage of opportunities to engage with and learn from the wider public, **including communities with which they have little or no experience**”

NEW CJC ETHICAL PRINCIPLES (2021)

“Judges are expected to be alert to the history, experience and circumstances of Canada’s Indigenous peoples, and to the diversity of cultures and communities that make up this country”

WHY “ENGAGE & LEARN WITH BROADER COMMUNITIES”?

Humans, by our very nature, stay within our own circles.

Esp. true for judges (common gender, race, social/privileged class).

Social media reinforces this human trait (“the echo chamber” of only hearing similar views and perspectives of those like you).

.



Real cultural competence cannot be learned from a book. It is achieved through relationships.

Direct engagement invites:

- Greater understandings
- Mutual trust
- Greater appreciation of differences
- Mute and counter prejudices and stereotypes – conscious or unconscious



IF WE ONLY CARE AND LOOK OUT FOR THOSE LIKE US...

WE ARE NOT TRULY IMPARTIAL

Our views are informed by those like us – not those different from us. We ONLY become impartial when our views are not shaped by prejudices and (mis)understandings of others

WE DO NOT SERVE

We do not serve the diversity of the public. Instead, our skills, knowledge and expertise assists those like us.

WE MAKE MISTAKES

Subtle cultural misunderstandings can have profound impacts on credibility findings, and our perceptions of a witness

WE ARE DETACHED

We are ignorant of our community. Our moral authority is questioned. Rule of law unravels.

“You can’t judge me. You don’t know me.”

VIGNETTES – GOOD & BAD

YELLING S. AMERICAN MOTHER

OCL concluded emotional harm because mother yelled at child. Inherent in OCL's conclusion was assumption S. American family yelled at each other. BUT: Child had ADHD and only responded to loud voices. Judge rejected OCL report.

SMELL OF CURRY

Indian family fought eviction b/c smell of cooking "interfered with reasonable enjoyment" of neighbouring tenant. Would adjudicator consider that Hindu family (vegetarian) was equally offended by smell of neighbour cooking meat?

HIV POSITIVE WITNESS

Ordered to wear a mask and gloves while testifying. This was well after science was clear that he posed no health risk.

JUDGE ATTENDS FN CEREMONY

Judge in FN Land Claims trial attends ceremonies with FN Elders and community within FN community. Impartiality protected by Fed & Prov Crowns also attending.

CHANGING PERCEPTIONS OF THE JUSTICE SYSTEM





DRIVERS OF THE SHIFT?

MURRAY SINCLAIR

Truth and Reconciliation Commission Report (2015)

SOCIAL UNREST - BLACK LIVES MATTER

You can't judge me. You don't know me.

DECLINING TRUST IN PUBLIC INSTITUTIONS

Public demands greater transparency, accountability, diversity in public institutions. Our legitimacy and rule of law depends upon it

SOCIAL MEDIA

Greater, faster spread of information demand that institutions change rapidly, or risk a loss of trust.



RULE OF LAW DEPENDS ON THIS SHIFT

Who are we to judge?

If we don't understand the history and experiences of the culturally diverse communities we serve.

Who will trust us?

Rule of law is a concept that depends entirely on the public's trust. It is not tangible. Trust leaves in a Ferrari; Arrives on horse & buggy.

Who will enforce our rulings?

Without trust in the judiciary, other branches of government – executive branch & policing – rendered illegitimate.

RESULTING IN...

Anarchy, chaos, absence of rule of law.



PART III – JUDGING DIVERSE CULTURAL COMMUNITIES – BEFORE, DURING & AFTER THE HEARING



JUDGING THEN VS NOW

JUDGES' LIKE-MINDED COMMUNITY

Judges' views & understandings shaped by their own community (like-minded, cultural and socio-demographic background).

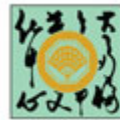
JUDGES' UNDERSTANDING BASED ON DIVERSE COMMUNITIES

Judges' views & understandings shaped by their own community, **AND** by the communities and relationships with those who are unlike the judge.

HOW? NOT FROM A BOOK. DIVE IN!!!



National Association
of Friendship Centres



大多倫多中華文化中心
Chinese Cultural Centre of Greater Toronto

叁拾 30th
Anniversary
周年紀念
1988-2018



Hispanic Canadian Heritage Council



SABA | South Asian Bar
Association of Toronto

CaribanaToronto.com
The Official Caribana Guide



Miles Nadal JCC
Downtown Toronto



JAPANESE CANADIAN
CULTURAL CENTRE
日系文化會館





CULTURALLY COMPETENT JUDGING

APPRECIATION OF EVIDENCE

Openness to seeing the same evidence from a different perspective

Question whether conclusions of others reached on incorrect assumptions/stereotypes

RECOGNITION OF HISTORY & IMPACT

Appreciate issues within that litigant's historical and cultural context

Extent to which judge can take judicial notice of history and condition of litigant, or as required by statute (e.g. Gladue courts)

DECISION-WRITING

Avoids myths & stereotypes;
Mindful of unconscious bias.

Identifies cultural backgrounds and how it informed assessment of evidence and conclusions

Sensitivity required but should not inhibit trier of fact from fact-finding responsibility

SAME EVIDENCE. DIFFERENT MEANING.



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the more you recognise how
people value things differently.

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The more you look at
the world, the more
you recognise people's
different values.

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The world's local bank



freedom status symbol polluter

The more you look at the world,
the more you recognise
that what one person values
may be different to the next.

www.hsbc.com
HSBC 
The world's local bank



pleasure pain pain pleasure

Another point of view
can sometimes open up
a whole new world.

youpointofview.com
HSBC 
The world's local bank

RECOGNITION OF CULTURAL BACKGROUND, HISTORY & IMPACT

R v Morris,
2021 ONCA 680

“...we accept that sentencing judges must acknowledge societal complicity in systemic racism and be alert to the possibility that the sentencing process itself may foster that complicity. A frank acknowledgement of the existence of...systemic anti-Black racism...will go some distance...”

R v Shafia,
2016 ONCA 812

Trial judge in a criminal case may rely upon expert evidence on relationship between culture, religion, patriarchy and violence against women.

*8573123 Canada v.
Keele Sheppard
Plaza Inc.,*
2020 ONSC 5457

Injunction to restrain eviction of commercial tenant, which was a Black/Caribbean restaurant.

Social realities pertaining to Black businesspeople factored into the court’s exercise of discretion when considering equitable remedies.

*Arulanantham v
Devine,*
2020 ONSC 803

When giving jury instructions in a civil case, it is not inappropriate for the trial judge to give instructions on the subject of peoples’ cultural backgrounds and their language skills.

CULTURALLY COMPETENT DECISION-WRITING

1. MYTHS/STEREOTYPES/UNCONSCIOUS BIAS

- Acknowledge in your Reasons when you have considered myths / stereotypes.
- Have colleagues review your decision before release.
- Read decision from the perspective of the losing party. Then again from perspective of winning party. Consider tone.
- Consider formality or informality. Always err on side of respect. (e.g., “With no disrespect to the plaintiff, I refer to him as Mohammed because that is how he was referred to at trial.”)
- Explain language that could be perceived as disrespectful (“Black slave to white man”)

2. DON'T SHY FROM FACT-FINDING RESPONSIBILITY

- It is our job to judge. Your cultural competency should not paralyze you from making factual findings. Rather, it should **enhance** your ability to find facts.
- Find facts from a perspective of knowledge, and not myths/stereotypes/unconscious bias. Ask yourself whether your view would be different if....
- Find facts respectfully. Consider whether firm language in your reasons is necessary.
- When assessing a witness' evidence, consider whether the witness' testimony was supported by the facts or informed by myths/stereotypes/unconscious bias.

3. YOUR STYLE

- Varies – depending on the case and the parties. My preference is to always write to both/all parties. Your reasons are for them, first and foremost.
- Reasons should convey that you understood their positions and their unique circumstances. (“Applicant was the mother” vs “Applicant was an immigrant from COUNTRY who experienced isolation as a young mother being away from her family.”)
- Keep it simple. Per Laskin JA, “Paint a fence post, not Sistine Chapel”
- Don’t recount *all facts*, then turn to issues. Leads to repetition.
- Instead, do Overview with key facts, then dive into legal issues and identify the relevant facts for each issue.
- Is it necessary to cite cases if you have identified the correct legal principle / test?

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THANK YOU

Hon. Justice Mohan Sharma

Ontario Superior Court of Justice,

Toronto Region