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LIVING WITH REVERBERATIONS OF RESIDENTIAL SCHOOL

By Tony Stevenson (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Tony Stevenson is a member of the Anishnabec First Nation in the Treaty 4 Area in Saskatchewan who attended the Qu'Appelle Indian Residential School in Lebret, Sask. He worked extensively with the independent assessment process preparing and representing peers and elders for compensation hearings. He was awarded the Queen's Diamond Jubilee Medal and recognized by both the Saskatchewan and Regina chambers of commerce for creating a cross-culture work project at the Conexus Credit Union. He travels to schools, universities, businesses and labour organizations to give presentations on truth and reconciliation. Learn more at MJ's Ole Skool Crew.

In light of the recent discoveries of the bodies that were purposely hidden from the families of the residential school survivors, I felt it appropriate to respectfully submit to you, my learned friends, how this continues to affect former students like myself in this day and age.

I recall my last day in residential school. It was Sept. 11, 1991, a Thursday afternoon. I walked up to the senior boys' childcare worker and told him that I was no longer interested in staying there. I was of legal age and it was my choice to leave, so I asked him to give me a ride to the bus station. Without hesitation he got the school van, drove me to the bus depot and wished me luck in my future endeavours.

I had first walked into that residential school back 11 years earlier in 1980 as a visitor to play hockey. Later, in 1981 I started as a full-time student.

It was bittersweet because I wanted to finish off my high school in a place I felt at home. I had finally made it to grade 12 and dreamed of graduating. I had spent the last 10 years here. I started at the school in grade five. (I know. The math doesn't seem to add up because I had failed a grade and had to restart grade 11 and 12 semesters as I attended junior hockey camps.)

Unfortunately, I should have stayed in those cities to play hockey but there was always a “lonesome” feeling to be around the ones that loved you, and the non-First Nation environment did not feel very inviting. I missed my fellow residential school students because they were like family. (I blew my chance to play hockey at a high level — I was told that I was good enough to go somewhere but did not believe it.)

I had the greatest opportunity to witness some of the most incredible athletic feats of long-distance running, sprinting, jumping, volleyball and basketball. As a kid I would try to emulate these athletic students (my family). I felt pretty lucky because I was in the same school as the people I believed were the top athletes of this era. (For a number of years — the mid-1980s — the volleyball and basketball teams had been ranked in the top five in Saskatchewan.)

Had I not seen it first-hand, I would not believe it possible, especially being a First Nation kid. The general feeling of being successful was always kind of fleeting.

The weird thing about these talented students was that they did not have to really work at it. They did not have to practise much; it came naturally for most of them.

My one older residential brother Rusty would fire up a cigarette before a 1,500-metre or 3,000-metre race, puff it down to the butt and usually win. My other li’l residential school brother Streak was not very big or tall but what he lacked in size he made up for it in endurance. He could run like the wind, and long distance was his forte. Brian, Warren, all these guys could rip up the 100-metre sprint faster than I ever saw anyone do it. Stan, Big Al, Claude, Spock and the girls, Michelle, Shannon, the list goes on.

The intellectual abilities were always apparent and competitive; there was no shortage of learned students. There was a high academic standard that many of my extended family achieved yearly. Along with the learned were the artistic and cultural students. The ability to dance traditional and/or fancy was coveted by the others. The world’s best ladies fancy dancer was also a fellow student in Lebret. This was a skill I had wished I could have followed and learned more of. Maybe one day I will.

> “I see that many of my extended family are no longer with us because of the intergenerational trauma that had hidden itself behind our times of glory and happiness.”

I have copies of the yearbooks from the ’80s era and every now and then I look at them. I see that many of my extended family are no longer with us because of the intergenerational trauma that had hidden itself behind our times of glory and happiness.

I recall a former student who had the potential to play at a high level of hockey.

This student, Peter, had been receiving letters from Junior A and WHL hockey teams from Manitoba and Saskatchewan. Back then, you had to be pretty darn talented as there were not many First Nations players in either of these leagues. Just to get a letter or invitation to one of these camps was a goal in itself. This kid also had the intellectual skills to be anything he wanted to be. I recognized his ability to program computers to create games and work on interactive pictures; he was adept at algebra and law. However, for some reason, he decided to drink and just throw it away.

Years later it became apparent why he did so. I always thought he was crazy for throwing away those opportunities. I read in the paper and saw on the news that this young boy was sexually abused during this time while he was in the residential school.

I had also met him one day and he told me he was in jail for assault and had no real prospects for the future. His life was not in order and he did not have the tools to deal with what had happened to him. He said it was worthless and he did not have the spirit to try to even live anymore. He was still seeking comfort at the bottom of the beer bottle. He told me he was worthless now. That was hard to hear and see. A once proud First Nation — fierce competitor, intellectually sharp, athletically gifted — had given up on life.

I want to say we hid that unspoken secret quite well in the early years of our lives. One of the reasons we bonded so well in the residential school was that we came from environments that had never healed and it planted a seed for self-destruction. For some unspoken reason that curse of abuse would one day rise up and come back to haunt us, in some cases take us from this life and

set us on our journey far too early to the other side.

It is sad because many of my schoolmates could never reach their full potential. Their bleak future was written for them the day they were born. Success was never in the books for many as they would never have the tools to break that harmful cycle of abuse. Along with the historical abuse, there was also the racist negative stereotypes that they had to face in the real world.

It was easier to make a life on the reserve and not deal with those extra pressures of being a First Nation. Living on a First Nation reserve is not what many of you think it is. If you watch the news and you see Third World living conditions, believe it, for many of us that is the life.

The last few weeks, I was triggered by the discoveries of the young ones found in unmarked graves, and in the same breath I certainly miss my extended brothers and sisters of my era. They were taken without any chance to live a full life. I miss them.

SUPREME COURT JUSTICE ROSALIE SILBERMAN ABELLA: THE EXIT INTERVIEW

By Terry Davidson
(Originally published in *The Lawyer's Daily*,

Editor's Note: The article below was first published on June 28, 2021 in The Lawyer's Daily, shortly before Justice Rosalie Silberman Abella retired from the Supreme Court of Canada.

For departing Supreme Court Justice Rosalie Silberman Abella, her parents' recounting of the Holocaust drove her passion for justice and equality, while presiding over family court taught her to listen and think beyond the bench.

After 17 years with Canada's highest court, Justice Abella will officially retire from that role on July 1 — the day she turns 75 and the country celebrates its national holiday.

On June 17, Prime Minister Justin Trudeau nominated Court of Appeal of Ontario Justice Mahmud Jamal to fill that spot. Born in Kenya, Justice Jamal is the first person of colour to sit on the Supreme Court of Canada.

Just days before, Justice Abella spoke with *The Lawyer's Daily* and was asked what would have to happen to see a Supreme Court that better reflects Canada's cultural diversity.

She spoke of a more diverse court as being inevitable, given the changes already seen.

"Over time, the way we introduced the reality of more women in the profession onto the bench, that will inevitably be the case for people of colour, Indigenous people, persons with disabilities, because they are people who are lawyers and who will find themselves, I'm sure, qualified to serve on the benches of this country. Many already are — and have — qualified and are serving in that way. That will only expand with time — and should."

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This commitment has been evident in Justice Abella’s numerous roles away from the bench.

She was chair and author of the Ontario study on Access to Legal Services by the Disabled in 1983. And in 1984 she wrote a landmark Royal Commission report on equality and employment, creating the term and concept of “employment equity.” Her theories on equality and discrimination in that report were adopted by the Supreme Court in its first decision on equality rights under the Charter in 1989.

Looking back, Justice Abella says she created the report “to make sure that barriers were reduced for more groups in society.”

“Women, Indigenous people, persons with disabilities, and non-whites. And those are all measures I believe in and have always believed in.”

Subsequent to the Royal Commission report, Justice Abella went on to serve terms as chair of the Ontario Labour Relations Board and the Ontario Law Reform Commission.

As a judge for the past 45 years, Justice Abella leaves behind a revered legacy.

After being called to the Ontario bar in 1972, she practised criminal and civil litigation before being made a judge in that province at 29. She remains Canada’s youngest person ever appointed to the judiciary, the first refugee to become a judge and the first Jewish woman to make it to the Supreme Court.

Her first stop as a judge was Ontario's family court. At the time, she was a young wife and mother. It was while behind this bench that she learned how to be a judge, she said.

"It was intellectually and emotionally a challenge to learn to listen to people whose lives were so different from my own, who were before the family court for decisions about what was going to happen to their children, when I had two young children of my own," she said. "Unlike other areas of the law, in family law you're not just sifting through the past to figure out what happened — like a contracts case or a negligence case, or even a criminal case. You're trying to decide, based on what happened, what is likely to happen to a child in the future. That's so hard to predict. So, you learn to do your best. But I never found, after seven years of doing it, that it was easy. I always felt I had a particular responsibility in that area of law to really try to bring the reality of their lives — the reality of the law — into some form of synchronization that made their lives less awful."

It was there she learned empathy; it was there she learned how to listen, both as a judge and as wife and mother. To this day, she calls it the most challenging part of her career as a judge.

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"I would say that I learned how to be a judge in the family court," said Justice Abella. "I learned how to listen from their perspective up, not from the top down [and] not imposing my views on the people before me — actually learning to listen, weigh the different points of view from people in a small courtroom, where they were two, three feet away from me. And you could tell they were desperate for resolution. They had wonderful social workers that helped; they had a whole system of support services that were potentially available, but they came to the judges for a solution, and knowing what the right solution is is so hard to know when you're dealing with families and children."

And Justice Abella knows of family hardship — an even darker, more sinister form — from a time before her birth.

At the start of the Second World War, her newly married parents, Jacob and Fanny Silberman, were taken from Poland and sent to separate Nazi concentration camps — Jacob to the Theresienstadt, in what is now the Czech Republic, and Fanny to Buchenwald, in Germany.

The young couple had a child who perished along with Jacob's parents and three younger brothers in the notorious Treblinka death camp, in occupied Poland.

At war's end in 1945, Jacob and Fanny were liberated from the camps — Jacob by the Russians and Fanny by the Americans — and housed in a displaced person's camp in Stuttgart, Germany. There, Jacob, a lawyer, was able to practise law.

Justice Abella was born in the camp on July 1, 1946.

Four years later, the family arrived in Canada as refugees, settling in Toronto. Jacob, unable to practise law due to his lack of Canadian citizenship, went into the insurance business, while Fanny became a real estate agent.

Justice Abella says her parents were open and unflinching in sharing with her stories of the camps. And from those stories came lessons and convictions she would carry with her not only in everyday life, but when behind the bench, as well.

"I think the older you get the more you realize how much your childhood has shaped you. And I don't think there's any doubt at all that my parents' experiences and my growing up and who they were as people shaped me in ways conscious and unconscious. It's … where I got a very strong sense of not tolerating injustice, if I could do anything about it. … [It is] certainly where I got my commitment to human rights and where I developed an intense aversion to discrimination or bullying of any kind — probably all unconsciously from my upbringing."

She decided to become a lawyer while still a child — a goal borne out of her father's inability to practise after arriving in Canada.

“That was when I decided that I was going to be a lawyer, because if he couldn’t do it — which struck me at the time as unfair — then I was going to do it, without even knowing what it meant to be a lawyer. I mean, how can you know when you’re 4? All I knew was something had happened to him that made me sad. He wasn’t [able] to be what he could be. [But] he never complained and he never looked back. [My parents] were incredibly resilient and courageous and optimistic. And they loved Canada.”

Justice Abella was asked if there were any judgments or dissenting arguments she penned that stand out for her.

“The question of what is memorable is something you can’t ask an author because it’s like asking a writer, ‘So, which of your many books do you think is really good?’ I’m not the person to weigh in on that; that’s a judgment other people really have to make. I’ve loved writing every single judgment I wrote — the majorities and the dissents — and I’ve never stopped feeling that it was an honour to be able to write them, and listen to the wonderful lawyers who presented the arguments, starting with the family court in 1976.”

But one thing is for certain: she has grown in the process.

“I think every judge I know works really hard to make sure they write reasons that as fairly as possible reflect a solid explanation for why whoever loses is losing, and whoever wins, won,” she said. “I’ve had a chance to write some really interesting judgments in every single area of the law, and I’ve learned from them, as well as by thinking through these issues, I’ve learned more about the legal system and the people behind it than I ever thought would be possible in a lifetime.”

She goes on to note how the country’s legal system has changed since graduating from law school in 1970.

“Everything about it is different. The emphasis on access to justice; the emphasis on concern for minorities and women; the emphasis on making sure that the judiciary and the legal profession are representative. All of those things I’ve watched and had a chance to participate in. In the course of that, there have been judgments along the way that have been part of that evolution towards more access, more equality, more fairness in the justice system. It’s what every judge strives to do, to be as fair as possible.”

Justice Abella will continue participating in deciding judgments with the Supreme Court until December. She will then prepare to begin a three-year term as a visiting professor at Harvard Law School, starting in 2022.

LAW COMMISSION OF ONTARIO'S LATEST AI CASE STUDY RAISES CONCERNS WITH GENOTYPING DNA TOOLS

By Amanda Jerome (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

A recent Law Commission of Ontario (LCO) report has highlighted the use of Probabilistic Genotyping (PG) DNA tools in Canada's criminal courts and warns that "absent proper scrutiny, process, and legislation, there is a risk that AI tools, including PG DNA algorithms, will worsen racism in Canada's justice system, and put access to justice further out of reach for many Ontarians."

The report, released June 30, explained that PG is "the use of artificial intelligence algorithms to analyze DNA samples collected in police investigations or criminal prosecutions."

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Kate Robertson, a co-author of the report, told *The Lawyer's Daily* that the report has "identified a number of comprehensive and pressing areas of reform" in this area.

She noted that probabilistic genotyping is already being used in criminal prosecutions in Canada and that "justice system participants, including the lawyers that are tasked with handling these cases and enforcing the human rights, and Charter rights and criminal prosecutions, will need to be alive to the complexities surrounding this type of evidence as well as the risks associated with the evidence that require systemic safeguards to prevent against rights violations and wrongful convictions."

Robertson, an associate at Markson Law and a research fellow with The Citizen Lab, co-authored the report with Jill Presser, who was appointed as a

judge of the Superior Court of Justice of Ontario on July 2 shortly after the report was released.

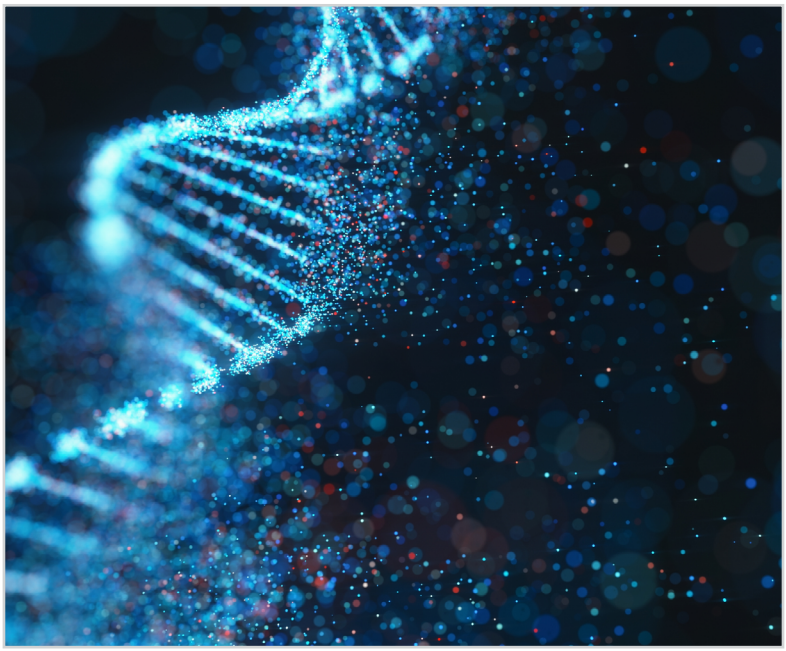
Robertson explained that part of the purpose of this report was to draw attention to the "dangers surrounding this evidence and identifying a path forward" for both governments and justice system players.

The report highlighted automation bias as one of the "unique challenges" raised by PG's use of AI. According to the report, justice system participants "may be inclined to accept the evidence generated by PG DNA tools, without adequate consideration of their scientific validity or accuracy."

"This is in part because of the well-documented tendency of lay people to be favourably impressed by expert scientific evidence. Studies reveal that members of the public see DNA evidence, in particular, as reliable, accurate, and authoritative," the report explained, noting that "many studies have found that jurors see DNA evidence as more than 90 [percent] accurate."

The report noted that "in the case of PG AI tools, the tendency of lay people to be impressed by DNA evidence is exacerbated by automation bias."

"This is the cognitive tendency to be impressed by, and defer to, the outputs of apparently scientifically and technologically advanced artificial intelligence tools. Since PG purports to analyze DNA evidence using artificial intelligence, it marries two types of tools that are regarded as highly authoritative by lay people," the report added.



The report also noted "barriers to transparency and due process arising from private sector involvement" as a unique challenge due to the "inner workings of PG AI tools" being "difficult to discover, evaluate, or litigate because their developers typically resist making meaningful disclosure."

“Market leading PG tool TrueAllele has forcefully resisted efforts to require it to disclose its source code or algorithms,” the report explained, adding that as of January 2017, “defendants in at least seven U.S. states had sought disclosure of TrueAllele’s code in their criminal cases.”

“Disclosure was denied in all cases on the basis of the developer’s right to protect its intellectual property,” the report noted.

“The other market leading PG tool, STRmix,” the report explained “will make its underlying information, including source code and foundational validation research, available to defence experts for review upon signing a nondisclosure and confidentiality agreement. However, the restrictions placed on this defence access are so extensive that one is left wondering whether there is much utility in it at all.”

According to the report, one defendant in Quebec, to date, has “sought to obtain disclosure in a criminal case in respect of the STRMix, including the validation study performed by Quebec’s forensic science laboratory,” but the court “rejected the defendant’s application for disclosure.”

Robertson noted that in industries outside of criminal justice where automation has been introduced “there is a well-documented and researched propensity among humans to infer that information generated by an algorithm is reliable as a result of the fact that it was generated by a computer.”

“That’s the case even in circumstances when we have reasons to doubt the reliability of that computer system and so automation bias is a persistent problem when it comes to probabilistic genotyping evidence because there are inherent frailties and sources of unreliability in that evidence,” she said, stressing that there is a “real risk” that jurors and judges will not understand that people are “factually innocent.”

Robertson said that one of the critical ways to guard against wrongful conviction, particularly in cases involving “novel forensic science that are fertile ground for wrongful conviction,” is to ensure due process and access to disclosure. She warned that “lack of transparency” surrounding this type of evidence is an issue.

She also noted that “the public has come to understand that traditional methods of analyzing DNA are viewed as a gold standard in forensic science and we’ve seen that traditional DNA evidence has even been capable of exonerating individuals who are historically wrongfully convicted.”

However, she stressed, "PG DNA evidence should not be equated with this type of gold standard."

"The method that this algorithm relies on does not confirm that a particular person is a source of the DNA sample at issue. Instead, the technique generates probabilities by comparing two hypotheses and it produces evidence as to which hypothesis is more correct. But at no point does the PG tool represent stand-alone evidence of the probability in the real world that the defendant actually contributed to the DNA and this conceptual distinction is extremely difficult for the human mind to grapple with," she told *The Lawyer's Daily*.

She warned that this forensic method is also "inordinately complicated and it will pose persistent barriers to the protection of human rights and fair trials when this evidence is being relied on, in part because it can be so difficult for judges, lawyers and computer scientists to understand the limitations of this technique."

"The Law Commission of Ontario has made a number of recommendations that are directed towards steps that the government should be taking at the provincial level and territorial level in order to safeguard against wrongful convictions and rights violations," Robertson said, noting that one of the recommendations is a review of legal aid programs "to ensure that defendants who are legally aided are able to access justice by being represented by lawyers who are competent and trained to address these types of novel forensic techniques."

"But it's difficult to put the burden of this exercise solely on the shoulders of individual lawyers who themselves cannot be expected to be experts in their own right," Robertson said, adding "access to training programs and systemically imposed safeguards, like access to disclosure, is critical in order to prevent miscarriages of justice which are most likely to fall on the shoulders of vulnerable communities who are already disproportionately affected by Canada's justice system."

Along with the review of legal aid, the report issued four other recommendations, which include: statutory amendments "focused on the use of PG DNA analysis as evidence"; statutory amendments "focused on enhancing systemic transparency and accountability"; practices and training (such as "establishing prosecutorial guidelines concerning the use of PG DNA evidence in criminal proceedings" and "developing access to training programs for all justice-system participants"); and further research and evaluation, with specific attention being paid to "PG DNA methods and their potential for bias."

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