SCC File No.: 36448

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JONATHAN DAVID MEER

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(JONATHAN DAVID MEER, APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act* and s. 691(1)(b) of the *Criminal Code*)

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A. Overview

1. This case[1] presents an opportunity to clarify the law and surrounding principles involved when courts consider the following issues: 1) the test for incompetent legal representation, and 2) whether and under what circumstances a trial judge may conduct an independent handwriting comparison under Section 8 of the *Canada Evidence Act*.[2]

2. A Notice of Appeal as of right was filed with the Supreme Court of Canada on May 21st, 2015.

3. In *Meer*, a majority of the Alberta Court of Appeal held defence counsel did not provide incompetent legal representation. The dissenting opinion of Berger J.A., however, found clear evidence to the contrary. This difference of opinion demonstrates a lack of certainty in the law of incompetent legal representation.

4. The testimony of defence counsel established that his conduct at trial was both "woefully incompetent", and that he was "ignorant of the applicable well-established law".[3] For Berger J.A., the Appellant was, therefore, denied effective legal representation – counsel's ineffectiveness related to critical aspects of the trial such that it could not be safely concluded that the appellant received a fair trial.

5. While Berger J.A. applied the test for incompetent legal representation found in *Joanisse*[4], the majority modified the existing law to preclude its application to the circumstances of this case.

6. The Court also disagreed on the proper application of the test for Section 8 of the *Canada Evidence Act* – the majority finding that comparative handwriting analysis was permissible (with or without notice[5]), while Berger J.A. concluded that notice was required.

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[1] *R. v. Meer*, 2015 ABCA 141 (CanLII).
[2] *Canada Evidence Act*, RSC 1985, c C-5.
[3] *R. v Meer*, 2015 ABCA 141 at paras 143-153.
[4] *R v Joanisse*, 1995 CanLII 3507 (ONCA).
[5] *R v Meer*, 2015 ABCA 141 at para 88.

B. Jonathan David Meer Retains Ajay Juneja to Provide Legal Counsel

7. Jonathan David Meer retained Ajay Juneja as counsel to defend him against 15 different charges under the *Criminal Code of Canada*.[6] After spending "well over two years"[7] in remand custody, his trial was heard on September 7, 2010.

8. Mr. Juneja represented Mr. Meer at both the preliminary inquiry and the trial. During the course of these proceedings, Mr. Juneja encountered problems with The Law Society of Alberta and faced a disciplinary hearing. This involved dishonesty and incompetence in his real estate practice.

9. In advance of the trial, the Crown applied to disqualify Mr. Juneja as counsel for Mr. Meer. In his reasons for judgment, Burrows J., found that:

> "There is **nothing** in what has been alleged against Mr. Juneja to justify the conclusion that his continued representation of Mr. Meer in this criminal case **creates so great a risk of incompetent representation or prejudice that the result of the trial would be in serious jeopardy on appeal**. In other words, I am satisfied that the circumstances **do not** create a significant concern that Mr. Meer will not receive a fair trial if represented by Mr. Juneja".[8]

10. When the Law Society proceedings were concluded in December 2011, Mr. Juneja received a suspension, and thereafter his practice was restricted. Critically for Burrows J., Mr. Juneja was permitted both to continue his work in the matter of Mr. Meer, and to practice criminal defence law.[9]

C. Justice Burrows' Comparative Handwriting Analysis

11. Mr. Juneja was not provided notice that the trial judge would conduct an independent comparison of the accused's handwriting.

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[6] *Criminal Code*, RSC 1985, c C-46.
[7] *Ibid* at para 131 see also *R. v. Meer*, 2010 ABQB 593 (CanLII) at para. 23.
[8] *R. v. Meer*, 2010 ABQB 593 (CanLII) at para 25 [Emphasis added].
[9] *Ibid*, see also at paras 20-24; Judgment of Alberta Court of Appeal, at paras. 16; (dissent) 131.

D. Trial Judgment

12. The reasons of the trial judge are set out in a 434 paragraph (78 page) judgment. Supplementary reasons were released by the Court on January 6, 2011.[10]

13. Mr. Meer was convicted and sentenced to 15 years' imprisonment. The judge cited, as significant, the handwriting analysis he undertook by comparing the sample found in 'Exhibit 48' to a diary allegedly belonging to the accused: "The comparison provides very strong support for the conclusion that the daytimer entries are in Jonathan David Meer's handwriting."[11]

E. Divided Court of Appeal

i. Justice Slatter and Justice Wakeling

14. On Appeal, two of the three judges decided that the appellant's counsel had not been incompetent. Specifically, the appellant was precluded from arguing his counsel had provided ineffective legal representation because of the controversy surrounding his real estate practice.

15. In effect, the majority found that the Appellant had retained an agent to represent him.[12]

16. The majority confirmed that the allegations against Mr. Juneja did not relate to his criminal defence practice: "In fact, when the Law Society disciplinary proceedings were concluded in December 2011, Mr. Juneja received a suspension, and thereafter his practice was restricted, but he was permitted to continue to practice in the areas of criminal defence and personal injury."[13]

17. The majority found that a timely objection to 'Exhibit 48' would have no bearing on the trial outcome and stated that trial fairness was not in issue.[14] Furthermore, the trial judge was deemed to be acting within his right to conduct an independent comparison of the accused's handwriting and notice was not required.

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[10] *R v Meer*, 2011 ABQB 8.
[11] *R v Meer*, 2010 ABQB 768 (CanLII) at paras 273-274.
[12] *R. v Meer*, 2015 ABCA 141 at para 34.
[13] *R. v Meer*, 2015 ABCA 141 at para 16 and para 34.
[14] *R. v Meer*, 2015 ABCA 141 at para 28.

ii. Dissenting Reasons of Mr. Justice Berger

18. In dissenting reasons, Berger J.A. concluded that Mr. Juneja's conduct during the course of the trial had been "woefully incompetent".[15]

19. In particular, Mr. Juneja's failure to object to the late disclosure of 'Exhibit 48' and seek an adjournment for the purpose of retaining an expert handwriting witness led Berger J.A. to question the reliability of the trial result. As set out by Berger J.A., notice **is** required where a trial judge undertakes to compare handwriting samples and draw inferences from the resulting comparison[16].

PART II – STATEMENT OF ISSUES

20. This leave application raises the following issues of national interest and public importance:

> **Issue One: Has the Alberta Court of Appeal modified the test for incompetence of counsel?**
>
> If your lawyer is under investigation by a law society, or the law society clears him/her to conduct a criminal trial, does proceeding with this lawyer mean a client has effectively waived his or her right to a reasonably competent counsel under Section 11(d) of the *Canadian Charter of Rights and Freedoms*? How are law society bencher decisions to be treated in the modified test?
>
> **Issue Two: Handwriting Experts Need Not Apply? – How might a judge conduct an independent evaluation of handwriting and draw his or her own conclusions?**
>
> Section 8 of the *Canada Evidence Act* does not explicitly forbid the trial judge from drawing common sense inferences. Is it permissible for a trial judge to conduct an independent assessment of handwriting without notice? Is the absence of notice to the defence a pre-requisite?

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[15] *Ibid* at para 153.
[16] *R. v Meer*, 2015 ABCA 141 at paras 137-139.

PART III – STATEMENT OF ARGUMENT

Issue One: Incompetent Legal Representation

21. Mr. Juneja testified that he had not adequately prepared for trial, had not anticipated emerging issues and was unaware of the applicable law. Berger J.A. summarized the key facts in the following paragraphs:[17]

> [145] It apparent from all of the foregoing that:
>
> - At no time before the trial began or in its presentation of the Crown's case did Crown counsel signal that it was the intention of the Crown to affirmatively demonstrate that the handwriting in the daytimer was that of the appellant.
> - AJ was prepared to rely on the testimony of his client and his client's wife that the handwriting was not that of the appellant.
> - AJ made **no** effort to seek the opinion of a handwriting expert.
> - Although AJ initially objected to the admissibility of Exhibit 48, he **withdrew that objection**.
> - AJ appreciated that Exhibit 48 had not been disclosed but **failed to object** on the basis of "unfair surprise" and non-disclosure.
> - AJ **sought no adjournment** to obtain the opinion of a handwriting expert.
> - Had AJ been aware of Exhibit 48, notwithstanding his client's desire to testify, it would have been prudent for AJ to have carefully considered whether it would be appropriate to put the appellant on the stand. Indeed, he acknowledges, "I would have to say that I think that he would still be testifying but I can't say to a certainty. If I had that document, there were other things that could possibly – other questions and other things I would have discussed with him."
>
> [146] As indicated above, the trial judge elected to conduct his own handwriting comparison in order to determine the author of the entries in the diary. AJ was **clearly unaware** that the trial judge as a matter of law was at liberty to do so. The following questions and answers make that clear:
>
> "Q Were you of the view that the judge in this particular case could make his own handwriting comparison for the determination of whose handwriting it was?
>
> A I was not of the opinion he could do that.
>
> Q You were not?
>
> A Not of the opinion." (Questioning on Affidavit of AJ, 25/24-26/3)
>
> [147] As to the admissibility of spousal communications, AJ was equally at sea. He testified in part as follows:

[17] *R. v Meer*, 2015 ABCA 141 at paras 143-148.

> "Q Prior to the trial, the spousal communications between Mr. Meer and Mrs. Meer, would you agree with me that those conversations were significant evidence for the Crown?
>
> A Yes.
>
> Q Would you agree with me that you did not discuss the admissibility of those conversations between Mr. Meer and Mrs. Meer with Mr. Meer before the trial?
>
> A I would agree with you on that, yes.
>
> Q Would you agree with me that you **did not direct your mind to the issue** of spousal privilege and it did not occur to you that these conversations might be inadmissible for that reason?
>
> A You are right, yes, I would agree. The **answer is yes**.
>
> Q Would you agree with me, with hindsight, that it would have been a worthwhile objection to make to try to keep those communications from becoming evidence?
>
> A I don't know because I intended on calling her as a witness."
>
> (Questioning on Affidavit of AJ, 26/4-24)
>
> ...
>
> "Q Would you agree with me that if they were not admissible evidence, the Crown could not use them to examine Ms. Meer or Mr. Meer?
>
> A I don't know the answer to that question. I didn't look at it and specifically consider it. I haven't looked at it since. You may be right. I don't know."
>
> (Questioning on Affidavit of AJ, 27/16-22)

[148] A miscarriage of justice will occur where counsel's performance was so incompetent as to have undermined the "fairness of the adjudicative process": ***Joanisse*** at 62.

[149] In the case at bar, **it is apparent that the appellant's trial counsel neither anticipated nor understood the significance of the critical evidentiary and procedural issues that would and did emerge at trial.** AJ was naively of the view that he need do nothing more than put his client on the stand and assert that the handwriting in the diary was not his. Defence counsel did not think to take it upon himself to compare the handwriting in the diary with a known sample of his client's handwriting. No expert testimony was sought before he put the appellant on the witness stand. Importantly, as the fresh evidence reveals, defence counsel had absolutely no appreciation of the very real prospect that his client might well be confronted in cross-examination with a known handwriting comparison and that the judge would be permitted, without the benefit of expert testimony, to compare the two.[18]

[18] *R. v Meer*, 2015 ABCA 141 at paras 145-149 [Emphasis added].

22. Mr. Juneja failed to object to 'Exhibit 48' (late disclosure) and seek an adjournment to consider the impact of the handwriting sample contained within the exhibit.

A. Has the Alberta Court of Appeal Modified the Test?

23. In *Meer*, the majority of the Alberta Court of Appeal found that, where an accused has any knowledge that his or her lawyer was subject to investigation by the Law Society, and, nevertheless proceeds with that lawyer, they cannot later avail themselves of the test in *Joanisse* and *B.(G.D.).*[19]. To do so, held the majority, is to resile from a tactical decision – the choice to vouchsafe the ground of incompetent legal representation in any subsequent appeal.

B. The Test as it Was (and Should Remain?)

24. In *Meer*, both the majority and dissenting judgment referred to the test found in *Joanisse* and reproduced in subsequent decisions[20]:

> The appellant must demonstrate:
>
> 1) The facts that underpin the claim of ineffective assistance on a balance of probabilities;
> 2) The incompetence of trial counsel's representation; and
> 3) That a miscarriage of justice resulted from the incompetent representation at trial.[21]

25. For the majority, however, an Appellant is precluded from raising the incompetence of counsel argument where that Appellant is "attempting to change a tactical decision he made at trial".[22]

26. In *Dunbar*, the B.C. Court of Appeal stated as follows "…Whether the legal representative meets the qualifications set by the governing body is not decisive of the question whether the defence was effectively conducted, and whether the trial was fair. To answer those questions, one must look at what counsel did, or did not do, and determine whether the appellant was prejudiced as a result."[23]

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[19] *R. v. Joanisse*, *supra*, see also *R v GDB*, 2000 SCC 22 (CanLII).
[20] See, for example *R v Aulakh* 2012 BCCA 340 (CanLII).
[21] *R. v Meer*, 2015 ABCA 141 at para 122.
[22] *R. v Meer*, 2015 ABCA 141 at para. 45.
[23] *R. v. Dunbar* 2003 BCCA 667 (CanLII) at paras 282-284.

27. Yet, the majority applied the following principles from *Wolkins* (originally outlined by the Ontario Court of Appeal in *Romanowicz*):

> 1) An accused who chooses to be represented by an agent waives the right to effective assistance of counsel, and
>
> 2) The fact that an agent is not a competent lawyer is not a ground of appeal.[24]

28. The majority found that, despite having retained and instructed counsel at trial, the Appellant could not say that his lawyer was a lawyer (for the purpose of Section 11(d) of the *Charter*) on appeal. The reason is that defence counsel was deemed to be an agent[25] – counsel was subject to an investigation by the Law Society of Alberta with respect to matters entirely unrelated to his criminal defence practice. Further complicating matters, the majority suspected that the Appellant had deliberately proceeded with this counsel (allegedly on the legal advice of Peter Royal Q.C.) to secure 'incompetent legal representation' as a future ground of appeal.

C. Principles Underlying the Distinction Between an Agent and Counsel

29. In *Meer*, Berger J.A. confirmed that, "Every accused is owed a fair trial. Section 11(d) of the *Charter of Rights and Freedoms* guarantees that. Competent representation by legal counsel ensures that right."[26] This statement accords with the test incompetent legal representation (prior to the majority's revision).

30. In *Wolkins*, Cromwell J.A. (as he then was), acknowledged that when citizens retain counsel, they expect that counsel will be competent:

> "It follows that when a lawyer does not provide competent representation, the courts will intervene to prevent any resulting miscarriage of justice. The **individual's choice of counsel does *not* mean that the individual is stuck with the consequences of unreasonable legal advice**; the freedom to choose counsel is ***not*** **taken as waiver of counsel's duty to be competent**. To the contrary, the accused is entitled to assistance which reflects the expertise rightly expected of lawyers" [emphasis added][27]

31. In other words, for Cromwell J.A., there is nothing between 'with' or 'without' counsel. There is no third category – one has either retained counsel, in which case they are entitled to the

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[24] *R v Wolkins*, 2005 NSCA 2 (CanLII) at para 67.
[25] *Ibid* at para 34.
[26] *R. v Meer*, 2015 ABCA 141 at para 120.
[27] *R v Wolkins* at para 73; see also *R v Romanowicz* 1999 CanLII 1315 (ONCA), 45 OR (3d) 506 at paras 27-31.

benefits that flow from that right, or else they have proceeded with an agent. It is novel to say that where counsel is under investigation from a law society that counsel is deemed to be an agent for the purpose of the trial and any subsequent appeal.[28]

32. Distinguishing between the expectations clients may expect from a lawyer and non-lawyer agent, Cromwell J.A. explained that: "In other words, an accused who chooses to be represented by a lawyer is taken to have accepted his or her professional judgment, but only to the point that the judgment displays reasonable professional competence and ethics. Where the judgment is shown to have been otherwise, the courts protect the client from the lawyer's actions to prevent a miscarriage of justice."[29]

33. On the other hand, a non-lawyer agent is not held to the same standard of competence as a lawyer, nor do they owe any professional obligation to the courts: "The choice to be represented by an agent, therefore, carries with it no reasonable expectation of competent representation such as exists in the case of representation by a lawyer. An accused has to live with the consequences of his or her informed choice to be represented by an agent. An accused is not entitled to complain on appeal simply that the agent did not perform like a competent lawyer."[30]

34. The disagreement in the Alberta Court of Appeal between the majority and the dissent is significant. The implications of this disagreement are that an accused person cannot clearly say, at the outset of a trial, whether they are exercising their right to counsel as guaranteed by Section 11(d) of the *Charter* or whether they will be deemed to have proceeded without counsel.

D. The Implications of the Alberta Court of Appeal Decision:

35. As a result of the divided Court of Appeal decision, we are left without a clear test to ascertain whether counsel will be treated as an agent for the purposes of any subsequent appeal. Courts of Appeal in Alberta[31], Nova Scotia[32], Ontario[33], and British Columbia[34] do not

[28] See *R v Romanowicz, supra,* at para 27.
[29] *Wolkins, supra*, at para 74.
[30] *Wolkins, supra*, at para 75.
[31] *R. v Meer*, 2015 ABCA 141.

definitively speak to the relevance of law society involvement on the question of incompetence. Public confidence in the Canadian legal profession is negatively affected by the uncertainty created by *Meer*.

36. Guidance is required on whether it is necessary to conclusively answer the following questions: is it enough that defence counsel is investigated by the law society? What if the law society clears counsel to proceed with a criminal trial? In *Meer*, the court was divided on this point.

37. The dissent found that counsel received a certain stamp of approval to proceed in the criminal trial – his practice was not restricted to the exclusion of criminal practice and the Law Society of Alberta specifically cleared him to continue work for Mr. Meer. Moreover, no evidence was ever presented to show that defence counsel was incompetent to conduct a criminal trial (remarkably both the majority and the dissent appear to agree on this point).[35]

Issue Two: Handwriting Experts Need Not Apply?

A. The Effect of Section 8: What's the meaning of the statute?

38. Section 8 of the *Canada Evidence Act* provides that comparison of a disputed writing with any writing proved to be genuine *shall* be made by witnesses.[36]

39. In *Meer*, Berger J.A. examined the implications of Section 8 and stated follows:

> [137] Section 8 of the ***Canada Evidence Act*** permits disputed writings to be compared "by witnesses". That is not to say, however, that a comparative evaluation by the trier of fact without the testimony of a witness is prohibited. The appellant contends, however, in reliance upon ***R. v. Cunsolo***, 2011 ONSC 1349 (CanLII), that the error here was the failure on the part of the trial judge to give notice that he alone would engage in comparative handwriting identification analysis. Such notice would have permitted defence counsel to marshal evidence from an expert, if available, to counter what proved to be the conclusion arrived at by the trial judge. ***Cunsolo*** (at para. 247) explained:

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[32] *R v Wolkins, supra*.
[33] *R v Romanowicz, supra*
[34] *R. v. Dunbar, supra*; *R v Aulakh, surpa*.
[35] *Meer* at para 34; 127-133.
[36] *Canada Evidence Act*, RSC 1985, c C-5.

> "It is important as an aspect of the accused knowing the case to be met, that he or she be on notice that the trier of fact may engage in comparative handwriting identification analysis: *R. v. Flynn*, 2010 ONCA 424 (CanLII), at para. 20; *R. v. Anderson*, 2005 BCCA 143(CanLII), at paras. 11-14."

The problem is that where the judge himself performs the comparison, counsel for the accused is deprived of an opportunity to cross-examine or, in this case, to lead evidence. In ***R. v. Boudreau*** (1987), 81 N.B.R. (2d) 148 (C.A.), the New Brunswick Court of Appeal held that "having accepted the invitation of Crown counsel to compare the signature, the judge became a witness in the cause upon which he was required to adjudicate."

[138] In ***R. v. C.F.***, 2010 ONCA 424 (CanLII) at para. 13, the Ontario Court of Appeal observed that:

> "... This court has held that it is open to a trial judge to make conclusions based on his own opinions as to disputed handwriting. A trier of fact may compare disputed handwriting with admitted or proved handwriting in documents which are properly in evidence: see e.g. *R. v. Abdi* (1997), 1997 CanLII 4448 (ON CA), 34 O.R. (3d) 499 (Ont. C.A.), at pp. 506-507, and *R. v. Malvoisin* (2006), 36 M.V.R. (5th) 187 (Ont. C.A.).

[139] The Court in ***Cunsolo*** went on to observe that care needs to be taken when the trier of fact embarks upon an unassisted handwriting comparison. The Court endorsed a "cautionary approach" when comparing documents without the benefit of witness testimony.[37]

40. In *Abdi*[38] (a decision relied upon by the majority in *Meer*), Robins J.A. for the Ontario Court of Appeal stated that, at common law, the trier of fact had been permitted to make a comparison without the aid of experts. There are conflicting schools of thought on the subject of whether they still can.

41. The majority in *Meer* had a difference of opinion on the correct interpretation of Section 8, the notice requirements and special care that should be taken when comparing handwriting without expert assistance:

> [85] The appellant appears to concede that a trial judge can sometimes undertake a handwriting analysis without expert evidence. He cites *R. v Cunsolo*, 2011 ONSC 1349 (CanLII), 277 CCC (3d) 435 which notes:

[37] *R v Meer* 2015 at paras 137-139.
[38] *R. v. Abdi*, 1997 CanLII 4448 (ON CA).

> 243 The prosecution may establish that a writing was made by an accused on the basis of an admission or agreement or, where disputed, by:
>
> (1) a witness acquainted with the accused's writing
> (2) expert evidence
> (3) comparative evaluation by the trier of fact without the testimony of a witness.
>
> 244 These proof processes, particularly the latter two described above, inevitably involve a comparison of unknown or disputed writing to a handwriting sample authenticated at trial to be genuine in the sense of a proved exemplar of the accused's writing, whether by admission or other persuasive proof.
>
> By its very wording this decision acknowledges the ability of the trier of fact to make findings about the authorship of handwriting without expert evidence, through a comparison of the disputed writing to a known sample.

[86] The appellant argues, however, that the three modes of proof mentioned in *Cunsolo* are given in “order of preference”. That may be so. It may be that expert evidence is the better evidence. But there is nothing in *Cunsolo* to support the proposition that handwriting analysis by the trier of fact is only permissible if it is supplementary to expert evidence on that subject: see *Cunsolo* at para. 246.

[87] The appellant argues that the trial judge should have cautioned himself about the dangers of doing a handwriting comparison without expert evidence. Some of the cases he relies on involved charges to juries, and make the point that a jury might not realize the pitfalls of this evidentiary process. Trial judges are used to assessing and weighing evidence, and there is no requirement that they overtly self-instruct on the frailties of every type of evidence relied on. In this case the trial judge used the handwriting analysis primarily to assess the credibility of the evidence of the appellant and his wife on the subject. Even though there was strong circumstantial evidence that the daytimer belonged to the appellant, he denied that the key entries were in his handwriting. His wife made the extraordinary suggestion that she had two different kinds of handwriting, one of which, remarkably, looked like the appellant’s. In that limited context the trial judge examined the handwriting to see if there were obvious differences that could assist him in his findings on credibility.

[88] There is no rule of law that a trial judge cannot do a handwriting comparison without expert evidence: …. Trial judges routinely examine pieces of real evidence, and it is artificial to say this turns them into “witnesses”. There is also no requirement for trial judges to give the parties notice that they propose to examine and weigh all the evidence

> on the record. The procedure and analysis adopted by the trial judge does not reveal any reviewable error.[39]

42. Hoyt J.A., writing for the New Brunswick Court of Appeal in *Boudreau*[40], found that the plain meaning of Section 8 – and in particular the word 'witnesses' – precludes the trial judge from conducting an independent examination and drawing his or her own conclusions. For Hoyt J.A, the trial judge must not become a witness insulated from the prospect of meaningful cross-examination.[41] Accordingly, the appeal was allowed in *Boudreau* and an acquittal entered.

43. The Ontario Court of Appeal, on the other hand, found the common law rule (that documents in evidence could be shown to the jury and/or the court for the purpose of comparison) was not 'ousted' by Section 8 of the *Canada Evidence Act*. Despite referring to the 'potential danger in making unassisted comparisons', the Court found that handwriting comparison is equivalent to other permissible comparisons made by the trial judge (as in *Nikolovski*[42]).

44. The problem with the Ontario Court of Appeal's reliance upon *Nikolovski* lies in the strength of its dissenting judgment and the practical effect of allowing the trial judge to undertake its own handwriting comparison – especially without notice. Sopinka J., found that, although the trial judge was entitled to rely upon their own sensory observations to prove identity (a proposition obvious to the Alberta Court of Appeal below), the fact that defence counsel was not advised that they would do so until argument meant that the verdict was not 'reasonable'.[43] The reason is simple: unless the judge advises counsel of its intention to draw comparisons before the conclusion of the Crown's case, defence counsel cannot determine the case to meet.

45. In *Meer*[44], the majority of the Alberta Court of Appeal found, in accordance with *Abdi* and *Cunsolo*[45] (a more recent decision of the Ontario Court of Appeal) that comparative

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[39] *R. v. Meer* 2015 ABCA 141 at paras 85-88 [Citation in para. 88 omitted].
[40] *R. v. Boudreau* [1987] N.B.J. No. 268.
[41] Note: in *R. v. Meer*, 2015 ABCA 141 (CanLII) the Alberta Court of Appeal refers to this characterization of the judge as being 'artificial'.
[42] *R. v. Nikolovski* [1996] 3 S.C.R. 1197, 111 C.C.C. (3d) 403; see also *Abdi*.
[43] At paras 43 and 47.
[44] *R. v. Meer*, 2015 ABCA 141 (CanLII).

handwriting evaluations by trial judges is permissible – though the majority conceded that, in order of preference, expert evidence is the better evidence.

46. Stated plainly, there is a conflict of opinion. Aside from the *Boudreau* decision, Courts of Appeal in a variety of jurisdictions[46] are relying upon *Abdi* and its progeny to understand the effect of Section 8. Why should the position taken in *Abdi* be followed in preference to *Boudreau*? In light of *Abdi*'s reliance on *Nikolovski*, the state of the law is problematic – even where the Courts of Appeal are in agreement that a trial judge may be permitted to conduct an evaluation of the accused's handwriting, they vary on the question of whether notice is required.

B. If a Judge can conduct handwriting comparisons, is notice required?

47. In *Cunsolo*, the Ontario Court of Appeal found that no unfairness arose where the defence was not given *advance* notice that the trial judge intended to rely on an assessment of the accused's handwriting. In *Meer*, the Alberta Court of Appeal interpreted this decision as saying there is no need to provide *any* notice. *Cunsolo* can and should be distinguished on this point.

48. The Court of Appeal found against the appellant in *Cunsolo* because, as they put it, "Defence counsel at trial *was aware* that the trial judge intended to conduct his own handwriting comparison and made lengthy submissions on the matter".[47] Moreover, "The trial judge reviewed the applicable legal principles before engaging in his analysis and properly instructed himself to be cautious".[48]

49. The passages quoted above are illustrative of the Court's reasoning in *Cunsolo*. The Court of Appeal found no error because the trial judge 'properly justified' his conclusion – adding that "nothing more was required". The question is whether the Court meant nothing more apart from 1) the notice that *was* actually given and 2) the self-administered instruction to be cautious.

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[45] *R. v. Cunsolo*, 2014 ONCA 364 (CanLII).
[46] See *Cunsolo* in Ontario, *Meer* in Alberta, *Anderson* in British Columbia.
[47] *Ibid* at para 42 [Emphasis added].
[48] *Ibid.* [Emphasis added].

50. Earlier decisions of the Ontario Court of Appeal and B.C. Court of Appeal demonstrate that there is confusion in the law with respect to notice requirements.[49] Despite the majority of the Alberta Court of Appeal's insistence in *Meer* that there is no notice requirement[50], the B.C. Court of Appeal has granted an appeal and ordered a new trial on the basis that inadequate notice was provided under identical circumstances[51]. In *Flynn*, the Ontario Court of Appeal highlighted as an 'important' factor that the appellant had been put on notice.[52]

C. Should greater caution be taken of the inherent risks involved with handwriting analysis?

51. The Ontario Court of Appeal in *Abdi* noted the risks associated with trial judges making unassisted handwriting comparisons – especially where such comparisons are made in the absence of expert or other evidence relating to the writings.[53]

52. As Hill J. of the Ontario Superior Court of Justice pointed out in *Cunsolo*, handwriting analysis is a scientific endeavour. Experts consider such things as line quality, writing fluency, rhythm, pen pressure, slope, stroke direction, and myriad fine details to assess and compare handwriting samples – concepts and criteria that would be alien to a lay judge.[54]

53. Without considering the relative quality of a trial judge's unschooled opinion on the subject of handwriting comparison, the reasons for judgment dangerously overestimate the extent to which 'common sense inferences' may be accurately drawn on the subject.

54. Although the majority of the Alberta Court of Appeal found 'ample authority'[55] for the ability of a trial judge to examine photographic evidence, comparing an accused person to their likeness in a video adduced into evidence or providing assessment of whether footprints tracked

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[49] See *R. v. Flynn*, 2010 ONCA 424 (CanLII) and *R. v. Anderson*, 2005 BCCA 143 (CanLII).
[50] *R. v. Meer*, 2015 ABCA 141 (CanLII) at para 88.
[51] *R. v. Anderson*, *supra*, at paras 11-16.
[52] *R. v. Flynn*, *supra*, at para 20.
[53] *R v Abdi* at paras 27, 29; see also *R v Cunsolo*, *supra*, at paras 251-256.
[54] *R v Cunsolo*, *supra*, at para 252.
[55] *R. v Meer*, 2015 ABCA 141 at para 24.

in snow indicate walking or running[56] is significantly different from handwriting analysis, which calls on more than a trial judge's ordinary sense perceptions.

55. Berger J.A., stated as follows:

> [137] Section 8 of the ***Canada Evidence Act*** permits disputed writings to be compared "by witnesses". That is not to say, however, that a comparative evaluation by the trier of fact without the testimony of a witness is prohibited. The appellant contends, however, in reliance upon ***R. v. Cunsolo***, 2011 ONSC 1349 (CanLII), that the error here was the failure on the part of the trial judge to give notice that he alone would engage in comparative handwriting identification analysis. Such notice would have permitted defence counsel to marshal evidence from an expert, if available, to counter what proved to be the conclusion arrived at by the trial judge. ***Cunsolo*** (at para. 247) explained:
>
> > "It is important as an aspect of the accused knowing the case to be met, that he or she be on notice that the trier of fact may engage in comparative handwriting identification analysis: *R. v. Flynn*, 2010 ONCA 424 (CanLII), at para. 20; *R. v. Anderson*, 2005 BCCA 143(CanLII), at paras. 11-14."
>
> The problem is that where the judge himself performs the comparison, counsel for the accused is deprived of an opportunity to cross-examine or, in this case, to lead evidence. In ***R. v. Boudreau*** (1987), 81 N.B.R. (2d) 148 (C.A.), the New Brunswick Court of Appeal held that "having accepted the invitation of Crown counsel to compare the signature, the judge became a witness in the cause upon which he was required to adjudicate."
>
> [138] In ***R. v. C.F.***, 2010 ONCA 424 (CanLII) at para. 13, the Ontario Court of Appeal observed that:
>
> > "... This court has held that it is open to a trial judge to make conclusions based on his own opinions as to disputed handwriting. A trier of fact may compare disputed handwriting with admitted or proved handwriting in documents which are properly in evidence: see e.g.*R. v. Abdi* (1997), 1997 CanLII 4448 (ON CA), 34 O.R. (3d) 499 (Ont. C.A.), at pp. 506-507, and *R. v. Malvoisin* (2006), 36 M.V.R. (5th) 187 (Ont. C.A.).
>
> [139] The Court in ***Cunsolo*** went on to observe that care needs to be taken when the trier of fact embarks upon an unassisted handwriting comparison. The Court endorsed a "cautionary approach" when comparing documents without the benefit of witness testimony.[57]

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[56] *R v Nikolovsk, supra*; *R v Lee*, 2010 SCC 52 (CanLII) at para 6.
[57] *R. v Meer*, 2015 ABCA 141 at paras 137-139.

56. In the present case, Burrows J. did not caution himself in his reasons for judgment.[58]

D. The Implications of the Alberta Court of Appeal Decision

57. The danger presented by the absence of clear notice requirements is as follows: "The comparison provides very strong support for the conclusion that the daytimer entries are in Jonathan David Meer's handwriting."[59] Clearly, where an independent handwriting comparison is undertaken by a judge, the resulting findings can be determinative of the trial outcome. It is a matter of public confidence in the administration of justice and appearance of objectivity that necessitates appellate intervention on this point.

58. At present, the Alberta Court of Appeal has found it unnecessary for a trial judge to caution themselves about the inherent risks associated with conducting unassisted handwriting analysis[60] (the absence of expert witness testimony on the point accentuates the risk). The result is a system in which a trial judge may interject his or her own opinion on a subject without having first provided defence counsel notice and the opportunity to present the accused's point of view.

59. For the majority of the Alberta Court of Appeal, defence counsel's failure to anticipate and react to the trial judge's decision was part of a 'tactical' exercise, orchestrated by Mr. Meer, and designed to ensure that incompetent legal representation could be used as future grounds for appeal.

60. Supreme Court intervention is necessary to bring the law of handwriting analysis in step with recent developments in Canadian criminal law to defer to the hard sciences on questions of evidence analysis. Public perception of the judicial reasoning process is adversely effected where the liberty of an accused is subject to the un-cautioned analysis of judges insofar as handwriting comparison is concerned.

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[58] *R. v. Meer*, 2010 ABQB 768 at para 274.
[59] *R. v. Meer*, 2010 ABQB 768 (CanLII) at para 274
[60] See, for example Hill J.'s discussion in *Cunsolo*, *supra*, at paras 252-256.

Conclusions

Issue One:

61. Guidance from the Supreme Court is necessary to ensure that the result of *Meer* is not reproduced in other jurisdictions. For Berger J.A., Mr. Juneja was clearly incompetent – the testimony of trial counsel,[61] set out above, demonstrates this.

62. Despite the instances of clear incompetent conduct, the majority in *Meer* found Mr. Juneja competent. The reasons are unsatisfactory – they reveal a serious gap in the present case law on the subject of ineffective legal representation in Canadian courts. For the majority, Mr. Meer was precluded from the test found in *Joanisse* and elsewhere. They took into consideration Law Society of Alberta investigations and found that, despite all evidence to the contrary, Mr. Meer was represented by an agent.

63. A clear formulation of the test is necessary in these circumstances.

Issue Two:

64. There are three issues with the current case law on the correct interpretation of Section 8 of the *Canada Evidence Act*.

65. First, there is a significant difference of opinion across Canada as to whether a trial judge is permitted to undertake the analysis. Although the majority and dissenting judgments in *Meer* appear to agree that Section 8 does not specifically forbid a trial judge from undertaking the analysis, *Boudreau* (decision from Newfoundland) takes a diametrically opposing view. There is no obvious reason to prefer one line of authority to the other.

66. Second, if the position taken by *Boudreau* is to be discarded, clarity is required on the issue of whether a trial judge must provide notice before comparing handwriting samples. The state of the law is undecided on this point – one line of authority (represented by the dissenting judgment in *Meer*) prefers to militate in favour of caution and insists that notice is required to

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[61] *R. v Meer*, 2015 ABCA 141 at paras 145-149.

ensure trial fairness. On the other hand, the majority in *Meer* found both that this was unnecessary and that any complaint with respect to the absence of cross examination (and the fact that the trial judge takes on the role of trier of fact and witness) on the point was "artificial"[62].

67. Finally, this appeal would provide this Honourable Court the opportunity to weigh in on the debate surrounding whether a trial judge (especially where unassisted by expert testimony) is properly qualified to conduct this kind of examination. As stated in greater detail above, comparative handwriting analysis is a science. Specialized technical examination is better left to experts, and goes beyond the trial judge's capacity to draw common sense inferences from ordinary perception.

PART IV – SUBMISSIONS ON COSTS

68. This Application for Leave to Appeal raises issues of national and public importance.

PART V – ORDER REQUESTED

69. The Applicants request that Leave to Appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of July, 2015.

Dale Knisely
Counsel for Applicant,
Jonathan David Meer

[62] *R. v Meer*, 2015 ABCA 141 at para 88.

PART VI – TABLE OF AUTHORITIES

PARA.

Cases

PART VII – STATUTORY PROVISIONS

Canada Evidence Act, RSC 1985, c C-5, s. 8
Charter of Rights and Freedoms, s. 11(d)
Criminal Code, RSC 1985, c C-46

***Canada Evidence Act*, RSC 1985, c C-5, s. 8**

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

8. Il est permis de faire comparer par témoins une écriture contestée avec toute écriture dont l'authenticité a été établie à la satisfaction du tribunal. Ces écritures, ainsi que les dépositions des témoins à cet égard, peuvent être soumises au tribunal et au jury comme preuve de l'authenticité ou non-authenticité de l'écriture contestée.

***Charter of Rights and Freedoms*, s. 11(d)**

11. Any person charged with an offence has the right

> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

11. Tout inculpé a le droit :

> *d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;