

# Don't Put Off Until Tomorrow What You Can Do Today

Avi Sharabi

416-596-2891

[asharabi@blaney.com](mailto:asharabi@blaney.com)

**Why Investigate Early?**

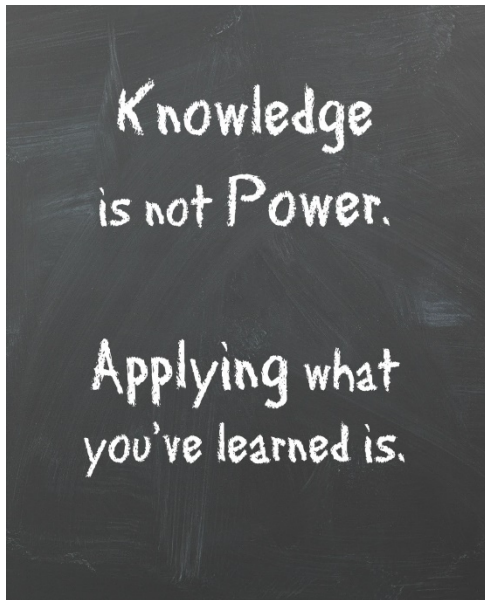
**Early Investigation Strategies (A  
Non-Exhaustive List)**

**Takeaways**



# THE BENEFITS: Formulating a Plan

- Avoid surprises:
  - Identify the strengths and weaknesses of your case early to gain a strategic advantage
- Forward thinking:
  - Build a (malleable) theory of your case early to inform resolution strategies



# THE BENEFITS: Informing the Pleading

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- The purposes of pleadings<sup>1</sup>:
  - Define the question in controversy between litigants
  - Give fair notice of the case which is required to be met and the remedies sought
  - Assist the court in determining the issues
- Pleadings should contain allegations of material fact, and disclose a reasonable cause of action<sup>2</sup>
- Early investigation can make the “facts” section of a pleading more persuasive, and serve as a roadmap going forward

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1. *Clarke v. Yorkton Securities Inc.*, 2003 CanLII 35578 (ON SC)  
2. See generally Rules 21 and 25 of Ontario’s *Rules of Civil Procedure*

# EXAMPLE:

## A Professional Liability Claim

A professional is sued. They tender a claim to their E&O insurer. There is a defence obligation. The claims examiner only has the statement of claim and the policy. The insurer retains defence counsel. How can defence counsel investigate this claim at an early stage?



# EARLY INVESTIGATION STRATEGY: The Insured

- Speak with the insured in order to obtain their point of view
- Obtain their file to look for objective evidence that would tend to either support the insured's perspective or that the other side(s) may use to make their case
- Explain the concept of relevance to the insured





# EARLY INVESTIGATION STRATEGY: Property Searches

- Is there a property involved (i.e. mortgage broker claim, construction E&O)?



# EARLY INVESTIGATION STRATEGY: Land Titles Search

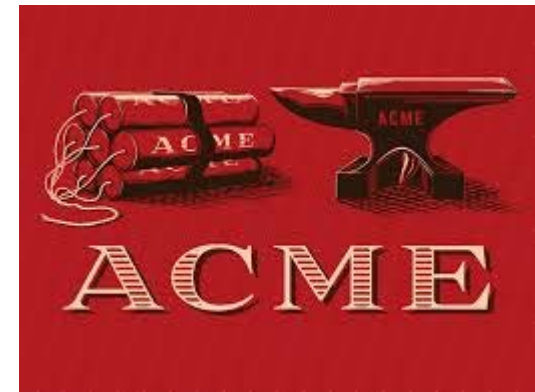
- Relatively inexpensive
- Reveals legal owner of the property
- Identifies other potential claimants (i.e. mortgagee)
- Useful if fraud is an issue
- Also useful in other contexts: i.e. property damage coverage, judgment execution, etc.

The image shows a screenshot of an Ontario Land Titles Search form. At the top, it features the Ontario ServiceOntario logo and a search box. Below the search box, there is a table with the following columns: REG. NO., DATE, INSTRUMENT FROM, INSTRUMENT TO, REGISTERED FROM, and REGISTERED TO. The table contains several rows of search results, including entries for 'MORTGAGE' and 'TRANSFER'. The text in the table is small and difficult to read, but it appears to be a list of registered instruments.



# EARLY INVESTIGATION STRATEGY: Corporate Search

- Is there a corporation(s) involved (i.e. company co-defendant(s), corporate plaintiff(s))?



# EARLY INVESTIGATION STRATEGY: Corporate Searches

- Relatively inexpensive
- Reveals key D's & O's – could reveal potential witnesses or key players
- Indicates if corporation still active
- Also useful in other contexts: i.e. D&O coverage matters, third party claims, etc.

Request ID: 000177613	Province of Ontario	Date Report Produced: 2005/10/21
Transaction ID: 12871095	Ministry of Consumer and Business Services	Time Report Produced: 14:36:56
Category ID: (C)CCE	Companies and Personal Property Security Branch	Page: 1

Certified a true copy of the data as recorded on the Ontario Business Information System at Companies and Personal Property Security Branch.

*[Signature]*  
Director  
Companies and Personal Property Security Branch  
Ministry of Consumer and Business Services  
Toronto, Ontario

### CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name	Incorporation Date
1990004	TEST	1993/02/25
		Jurisdiction
		ONTARIO
Corporation Type	Corporation Status	Former Jurisdiction
ONTARIO BUSINESS CORP.	ACTIVE	NOT APPLICABLE
Registered Office Address	Date Amalgamated	Amalgamation Ind.
2 QUEEN STREET	NOT APPLICABLE	NOT APPLICABLE
Suite # 222	New Amal. Number	Notice Date
TORONTO	NOT APPLICABLE	NOT APPLICABLE
ONTARIO		Letter Date
CANADA M6M 6M6		NOT APPLICABLE
Mailing Address	Revival Date	Continuation Date
2 QUEEN STREET	NOT APPLICABLE	NOT APPLICABLE
Suite # 222	Transferred Out Date	Cancel/Inactive Date
TORONTO	NOT APPLICABLE	NOT APPLICABLE
ONTARIO		EP Licence Eff.Date
CANADA M6M 6M6		NOT APPLICABLE
	EP Licence Term.Date	NOT APPLICABLE
	Number of Directors Minimum Maximum	Date Commenced in Ontario
	UNKNOWN UNKNOWN	NOT APPLICABLE
Activity Classification		Date Ceased in Ontario
NOT AVAILABLE		NOT APPLICABLE

SAMPLE

# EARLY INVESTIGATION STRATEGY: The Professional(s)

- Professionals are usually regulated: FSCO – mortgage brokers; RECO – real estate salespersons/brokers; LSUC – lawyers
  - RIBO – insurance brokers; MFDA – mutual fund dealers; Etc.
- Look up professional standing for free
- Disciplinary rulings
  - should not be binding on civil action<sup>3</sup>
  - relevance and weight are always factors
  - optics, optics, optics!

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3. *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125

# EARLY INVESTIGATION STRATEGY: Experts

- Some Basic Premises<sup>4</sup>:
  - Experts are needed to prove technical issues, such as professional negligence (in most contexts), and certain kinds of damages, as well as other issues (i.e. patents)
  - their duty is to the court
  - they must remain unbiased and impartial
  - defence counsel cannot compromise the expert's objectivity
  - consultation and collaboration are allowed in principle (but be careful not to inappropriately influence the expert!)
- However: biases are inherent in the litigation process

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4. See *Moore v. Getahun*, 2015 ONCA 55 (CanLII) w.r.t. Ontario, and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII) w.r.t. Federal Court.

# EARLY INVESTIGATION STRATEGY: Experts

- Examples of Biases<sup>5</sup>
  - Selection bias – choosing the “usual suspects”
  - Affiliation bias – i.e. “Stockholm syndrome”
  - Compensation bias – a more favourable opinion is worth more
  - Hindsight bias – “Overconfidence is fed by the illusory certainty of hindsight.”<sup>6</sup>
  
- Will retaining an expert early on, and picking their brain improperly bias them, if you plan to ask them to give an opinion at trial? Do we need to “blind” them to certain information?

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5. C Robertson and A Kesselheim, *Blinding as a Solution to Bias*, 1<sup>st</sup> ed (Arizona: Academic Press, 2016)

6. D Kahneman, *Thinking Fast and Slow* (Toronto: Anchor Canada, 2013)

# EARLY INVESTIGATION STRATEGY: Experts

- The answer: it should depend on the logic upon which the opinion is founded
- “I am mainly interested in the substance of an expert’s opinion and the reasoning that led to that opinion. If it is well-reasoned, there may be no reason for concern about whether the witness was blinded to certain facts when giving the opinion. A concern may arise where the expert’s opinion seems tortured or less well-reasoned.”<sup>7</sup>

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7. *Shire Canada Inc. v. Apotex Inc.*, 2016 FC 382 (CanLII), Locke J.

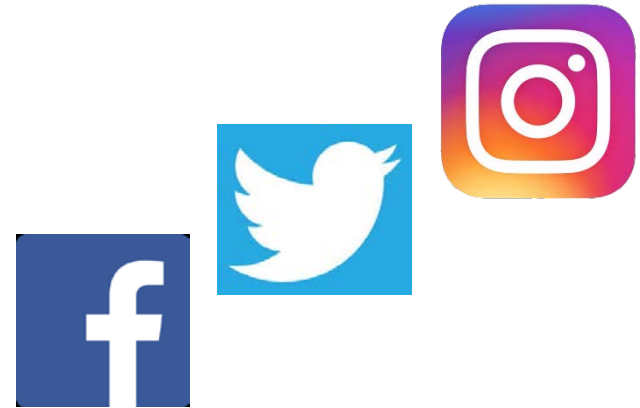


# EARLY INVESTIGATION STRATEGY: Experts

- How can we utilize an expert at the investigation stage, without causing undue bias?
  - Do not ask them conclusory questions on liability
    - i.e. ask them to identify what key facts they would need to both prove liability or disprove it. That way, you know what both sides should be looking for
  - Make use of the expert as a learning tool, not as a source of opinion evidence
    - i.e. in the damages context, such as where business or stock/bond valuations are at issue (or other technical issues are at play), find out what approach is used in that field to value the business, stock, bond, etc.

# EARLY INVESTIGATION STRATEGY: Social Media

- Facebook, Twitter, Instagram, etc.
  - Two key considerations of a court:<sup>8</sup>
    - Relevance to the matters at issue
    - Whether disclosure breaches the party's privacy



i.e. Plaintiff resisted disclosure of private part of Facebook account. Public part contained relevant information. Reasonable to infer that private part also contained relevant information. Privacy concerns alleviated since plaintiff shared private information with 200 other people (only 5 of whom were close friends).

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8. *Frangione v. Vandongen et al.*, 2010 ONSC 2823 (CanLII)

# EARLY INVESTIGATION STRATEGY: Wearable Technology?

- Wearable technology (i.e. smart watches, Fitbits, etc.) can measure:
  - Heart rate
  - Quality of sleep
  - Number of steps climbed
  - Number of steps walked
  - Etc.

Find the FITBIT  
tracker for you.



		zip	one	flex	alta	chargeHR	blaze	surge
		EVERYDAY FITNESS			ACTIVE FITNESS		PERFORMANCE FITNESS	
Steps, Calories, Distance	🏃	✓	✓	✓	✓	✓	✓	✓
Clock	🕒	✓	✓	✓	✓	✓	✓	✓
Sleep Tracking & Alarms	🌙		✓	✓	✓	✓	✓	✓
Floors Climbed	🏔️		✓			✓	✓	✓
Active Minutes	🏃	✓	✓	✓	✓	✓	✓	✓
Auto-Exercise Recognition	🏃				✓	✓	✓	✓
Multi-Sport	🏃					✓	✓	✓
Continuous Heart Rate	❤️					✓	✓	✓
Caller ID	📞				✓	✓	✓	✓
Notifications & Music	📱						✓	✓
GPS Tracking	📍							✓
Connected GPS	📍						✓	✓
Customisable Clock Face & Display	🕒				✓	✓	✓	✓
Accessory Bands	📁				✓		✓	✓

# EARLY INVESTIGATION STRATEGY: Wearable Technology?

- U.S. defence counsel are beginning to request this information as part of their discovery process
- How might a court in Canada view such evidence?
  - Relevance: arguably similar to social media
  - Privacy: not something usually shared with “social media friends”, unless the user posts their results on social media, but what about the meta-data?
  - Also, unlike social media, the following issues apply:
    - Reliability of the technology<sup>9</sup>
    - Chain of custody/preservation of evidence

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9. Class action lawsuit filed against Fitbit, Inc. in Federal Court (San Francisco) alleging Fitbits are unreliable at measuring heart rates. A new study commissioned by class counsel agrees with this contention.

- Early review of the insured's file
  - Assess exposure
  - Review privilege
- What if the insured's file is fairly large?
  - E-Discovery?
  - Cost/benefit analysis

## How is Ediscovery Done?

- ◆ The Ediscovery process is often broken down into a multiphase model known as the Electronic Discovery Reference Model (EDRM). The nine components of the model represent steps in the EDiscovery Process.



# EARLY INVESTIGATION STRATEGY: Predictive Coding Software

- Problem: traditional e-discovery technology utilizes Boolean logic (i.e. “stock” /p “option”)
- What about Predictive Coding?<sup>10</sup>
  - Useful for massive sets of documents
  - Lawyers “train” the software by culling a sub-set of documents and earmarking it for relevance, privilege etc. Software “learns” from this sub-set and applies algorithm to remaining documents

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10. Courts in both the United States and Canada have acknowledged this method of e-discovery. See *Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) aff’d 2012 WL1446534 (S.D.N.Y. Apr. 26, 2012); *Bennett v. Bennett*, 2016 ONSC 503 (CanLII)

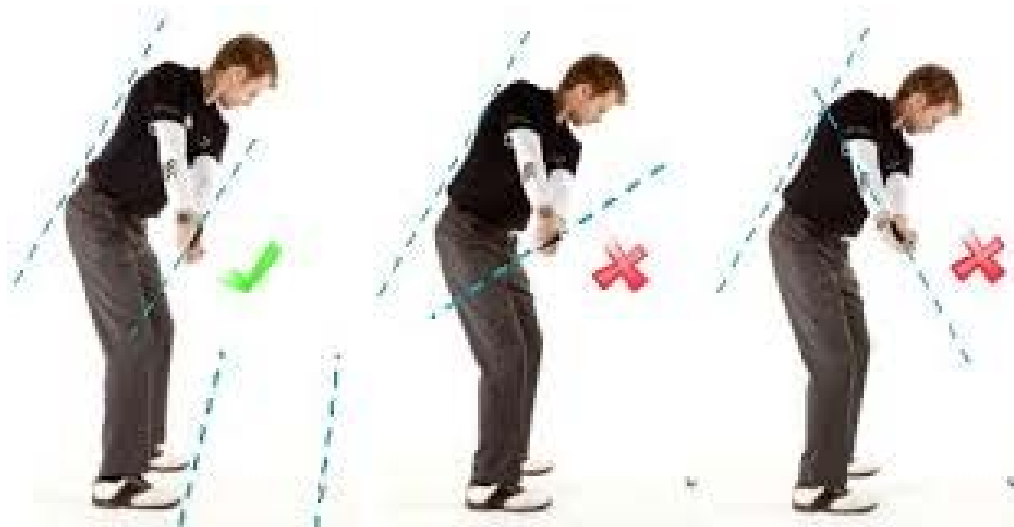


# EARLY INVESTIGATION STRATEGY: Predictive Coding Software

- **Pros:** identify more relevant documents than traditional software; (in theory) eliminate inconsistent production; and reduce the risk of being accused of leaving out relevant documents (blame the software!)
- **Cons:** usually need approval from the opposing party(ies), which may result in opposing counsel wanting to be actively involved in developing the algorithm and opposing counsel may gain access to irrelevant but potentially damaging documentation; not always reliable at sorting out privilege

## TAKEAWAYS:

- Start building your theory of the case early
- Think of the insured as a source of information
- Obtain relatively inexpensive registry searches to verify property and/or corporate information
- Obtain FREE regulatory information, where applicable



## TAKEAWAYS:

- Seek professional help
- Be mindful of relevance
- Be wary of privacy concerns
- Be on the lookout for new technology
- Never be beholden to your theory – keep evaluating the insured's exposure objectively

