



Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON, M2H 3R1 Canada | [www.law360.ca](http://www.law360.ca)  
Phone: (800) 668-6481 | [customerservice@lexisnexis.ca](mailto:customerservice@lexisnexis.ca)

## Generative AI still no substitute for professional expertise, B.C. judge says

By **Ian Burns**

Law360 Canada (February 28, 2024, 12:40 PM EST) -- A B.C. Supreme Court judge has said a lawyer's use of generative AI which invented two non-existent cases as part of an application in a parenting dispute was troubling but did not amount to conduct which warranted the imposition of special costs.

As part of what was described as a high-conflict family dispute between millionaire Wei Chen and his ex-wife Nina Zhang over parenting time, lawyer Chong Ke inserted two non-existent cases into a notice of application which were discovered subsequently to have been "hallucinated" by ChatGPT, a chatbot program whose core function is to mimic human conversation but has shown the ability to create computer programs, compose music and write poetry.

The two non-existent cases were said to involve situations where a parent took her "child, aged 7, to India for six weeks" and another granting a "mother's application to travel with the child, aged 9, to China for four weeks to visit her parents and friends." A legal researcher employed by Zhang's legal team was not able to locate the cases and eventually came to the view that they did not exist. Ke subsequently sent an email which contained an apology and admission that the subject cases were fake.

Zhang's counsel sought special costs against Ke, but her lawyer argued it was known by opposing counsel well in advance that the fake cases would not be relied upon and, despite the fact her conduct was presumptively negligent, the authorities indicated that more was needed, such as an intentional act to mislead.

And Justice David Masuhara, while finding Ke's conduct troubling, wrote he did not feel she intended to deceive the court (*Zhang v. Chen*, 2024 BCSC 285). He noted it is an "extraordinary step" to award special costs against a lawyer as it requires a finding of reprehensible conduct or an abuse of process by the lawyer, and a mere mistake, error in judgment or even negligence does not warrant such an order.

"Though I recognize the notice of application containing the fake cases was filed and was before the court in the hearing, they had been withdrawn. I am of the view that the cases would not have been argued in support of the application, in any event," he wrote. "There was no chance here that the two fake cases would have slipped through. A book of authorities would have had to be produced and handed up, which would have exposed the non-existence of the cases. These circumstances would have been known to Ms. Ke when she was preparing the notice of application."

Justice Masuhara also wrote he accepted Ke's evidence she was naïve about the risks of using ChatGPT and that she took steps to have the error corrected.

"Though her legal education is extensive, there is a significant difference between academics and lawyering," he wrote. "I accept the sincerity of Ms. Ke's apology to counsel and the court. Her regret was clearly evident during her appearance and oral submissions in court."

But Justice Masuhara wrote that generative AI is "still no substitute for the professional expertise that the justice system requires of lawyers."

"Competence in the selection and use of any technology tools, including those powered by AI, is

critical," he wrote. "The integrity of the justice system requires no less."

Justice Masuhara wrote it was "troubling" that Ke did not read the warning on the ChatGPT website that the bot's output could be inaccurate and that using it is not a substitute for professional advice.

"Ms. Ke was using a generative AI tool not fit for her purposes," he wrote. "It is also unfortunate the fact the cases were fake was not conveyed to opposing counsel when Ms. Ke first discovered the true nature of the cases."

In the end, Justice Masuhara wrote the application of rule 16-1(30) of the B.C. Supreme Court family rules, which says that a court may order that a lawyer be personally liable for all or part of any costs ordered to be paid to another party, was appropriate in the circumstances.

"While I have dismissed the request for special costs, I recognize that as a result of Ms. Ke's insertion of the fake cases and the delay in remedying the confusion they created, opposing counsel has had to take various steps they would not otherwise have had to take," he wrote.

Zhang's counsel, Fraser MacLean of MacLean Family Law, said the decision was well-reasoned and balanced and "gives sage guidance to the profession and the public on the issue of artificial intelligence in the legal profession."

"Some of the damage that flows from AI hallucinations is the potential for flawed or erroneous decision-making by the courts, the wasting and increasing of an opposing party's time and money, and the concurrent wasting of the court's resources and tax dollars," he said.

MacLean said it is scary that A.I. hallucinations "aren't generating ambiguous case summaries."

"These fake authorities were exactly on point and looked 100 per cent real in the summaries that were generated. It is important for both counsel and judges to be vigilant when checking for these things," he said.

Fraser MacLean's co-counsel Lorne MacLean said, as suggested by University of Ottawa professor Amy Salyzyn in her paper A.I. and Legal Ethics, law societies — and the courts — should amend their rules around competence to require lawyers to understand and use "relevant technology that is reasonably available to them."

"Also, an amended confidentiality rule would require lawyers to make reasonable efforts to prevent unauthorized or inadvertent disclosure of confidential client information, and the proposed new due diligence rule would require 'reasonable steps' be taken to ensure that legal technology being used is consistent with a lawyer's ethical duties," he said. "And, we add a fourth suggestion that whenever AI related to legal documents filed in courts is used that the lawyers identify for the courts what, if any, portion of documents or arguments have been created with the assistance of artificial intelligence, and for what purpose. And further, and critically, that the lawyer provides their undertaking that they have provided direct human oversight to ensure that any such artificially generated legal work is verified as 100 per cent accurate."

In an email, Law Society of British Columbia spokesperson Christine Tam confirmed that the law society was investigating Ke's conduct in the case.

"While recognizing the potential benefits of using AI in the delivery of legal services, the law society has also issued guidance to lawyers on the appropriate use of AI and expects lawyers to comply with the standards of conduct expected of a competent lawyer if they do rely on AI in serving their clients," she said.

Counsel for both Ke and Zhang were not immediately available for comment.

*If you have any information, story ideas or news tips for Law360 Canada please contact Ian Burns at [Ian.Burns@lexisnexis.ca](mailto:Ian.Burns@lexisnexis.ca) or call 905-415-5906.*