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LAW MATTERS

Truth & Reconciliation

Truth & Reconciliation Commissioner

Wilton Littlechild, QC

In Memoriam

Hersh Wolch, QC

Unsung Hero

Dennis Callihoo



THE CANADIAN
BAR ASSOCIATION
Alberta Branch

BY JOSHUA SEALY-HARRINGTON

I would like to begin this introduction by acknowledging that I write from the position of a settler with mixed Trinidadian/Canadian descent living in Ottawa, on the traditional unceded territory of the Algonquin nation. I say this to recognize that, while I am introducing a publication discussing Indigenous issues, I am not Indigenous; portions of my ancestry are linked to historical and ongoing abuses of Indigenous Peoples; my understanding of Indigenous issues is limited by my lack of personal experience as an Indigenous person; and I currently live on unceded Algonquin territory (itself, a manifestation of ongoing exploitation of Indigenous Peoples). Still, my privileged subject position should not prevent me (or any of us, for that matter) from promoting progressive discourse on critical issues in Canadian society. Indeed, we must use our privilege to amplify marginalized voices within Canadian discourse. With that in mind, I am thrilled with the outstanding Indigenous contributors we have in this edition of *Law Matters*, and I am honoured — as the incoming Editor of *Law Matters* — to author the introduction to this edition focussing on Truth and Reconciliation.

Truth and Reconciliation is a process. Knowing the *truth* of how Canada's residential school system abused Indigenous communities is a precursor to the process of *reconciling* that horrific legacy with a future vision of Canada built on mutual respect. This process is ongoing, and one we must all take part in. Whether its protests during the "Canada 150" celebrations, the overincarceration of Indigenous Peoples in the Canadian criminal justice system, or the ongoing crises of missing and murdered Indigenous women and girls and lack of drinking water on Indigenous reserves, a long road lies ahead in Canada's path towards reconciliation.

While by no means exhaustive, this edition of *Law Matters* exposes the reader to some important aspects of Truth and Reconciliation.

For example, Chief Wilton Littlechild, QC — a commissioner of the Truth and Reconciliation Commission — describes hearing from Residential School survivors about their lived experiences. His account is an excellent introduction to the Truth and Reconciliation process in Canada. And it includes a recommendation for where readers should turn next: reading the 94 Calls to Action, identifying those that resonate with them, and taking part in the process of reconciliation. The Calls to Action can be found here: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

Koren Lightning-Earle — the Indigenous Initiative Liaison at the Law Society of Alberta — describes the Law Society's response to the Calls to Action. She notes how reconciliation requires everyone's participation, including those providing legal services to Indigenous communities (a point also noted by Kendall Moholityny, who discusses access to justice concerns for Indigenous communities, and how providing pro bono legal services to those communities is a further means of reconciliation). Areezah Jiwa and Bernadette McMechan's summary of recent University of Alberta Faculty of Law initiatives geared towards reconciliation in the law school setting is yet another step in the right direction.

Rob Harvie, QC — a non-Indigenous lawyer — describes how his upbringing in Southern Alberta exposed him to woefully inadequate education about Canada's historical abuses of Indigenous Peoples (a point I can echo in my own experience growing up in Alberta). He notes how he was more familiar with the U.S. Civil War than the atrocities committed by his own government against Indigenous communities. He also describes his experience chairing a discipline committee in respect of David Blott, who was disbarred for exploiting Indigenous communities for profit in their residential school settlement claims; yet further proof of the ongoing abuses against Indigenous communities.

These are just some of the pieces included in this edition of *Law Matters*. I urge you to review them, mindful of how you, too, can further reconciliation. But remember, truth and reconciliation is a two-step process. The truth of our historical and ongoing abuses of Indigenous communities must first be understood before that past can be reconciled with our future. For that reason, I urge you to also review the Summary of the Final Report of the Truth and Reconciliation Commission of Canada; it can be found here: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf. It is long, but that length reflects the even longer history of Canada's abuses against Indigenous communities. Only by confronting these truths, can reconciliation be pursued in an informed manner, sensitive to the history of abuses motivating that reconciliation.

Please read this edition of *Law Matters*, and then, more importantly, take action! 🗳️

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BY JENNY McMORDIE



Fall in Alberta is marked with cooling weather, the changing colours of the trees, and the occasional snowfall, while fall at CBA Alberta begins with the start of our Section programming, when our members return to our Calgary and Edmonton offices for their regular lunch-time meetings.

Also marking the new CBA year is the introduction of a new CBA Alberta Executive Committee. Please join me in welcoming our newest Executive member David Hiebert, who was elected to fill the position of CBA Alberta Secretary this past spring. David will join me, Vice-President Frank Friesacher, Treasurer Ola Malik, Past President Jeremiah Kowalchuk and Executive Director Maureen Armitage. I would also like to recognize our outgoing Past President Wayne Barkauskas, who completed his five-year term on the CBA Alberta Executive Committee in August. Please join me in thanking Wayne for his dedicated service to the Executive over the past number of years, and wishing him well in the future. Wayne will continue to be active with CBA Alberta this coming year, as he has agreed to Chair the Agenda for Justice & Advocacy Committee.

Earlier this fall, we were extremely pleased to hear that Steven N. Mandziuk, QC, who served as CBA Alberta President in 2013 – 2014, was appointed a justice of the Court of Queen's Bench of Alberta in Edmonton. Justice Mandziuk's contributions to the CBA are almost too numerous to count, and in addition to his five years on the CBA Alberta Executive Committee, he served as the first chair of the national Re-Think Committee, chaired the Alberta Branch Agenda for Justice & Advocacy Committee, was a Section Coordinator for our northern Sections, and has sat on several Section Executives and committees. On behalf of our entire Executive Committee and CBA Alberta, I extend my congratulations to Justice Mandziuk and wish him the best in his new position on the bench!

In August, the CBA held its first Annual Meeting under the new organizational structure approved at the summer 2016 meeting of National Council. For the first time in the CBA's history, all CBA members were invited to attend and participate in the Annual Meeting. This was also the first year that members were able to participate in remote "hubs", rather than travel to Ontario for the meeting. Hubs were held in Edmonton and Calgary, and we were delighted to have a strong turnout by our members in both locations. The next CBA Annual Meeting will take place on February 15, 2018, and more details about how to participate will be available early in the New Year. We encourage everyone to attend!

The focus of the 2017 Annual Meeting was the resolution on the new bylaws of the CBA. The resolution was passed overwhelmingly, and will fundamentally reshape how our association governs itself. Debate on the resolution focused on how the organization will define "diversity" to hold the CBA accountable to its commitment to have a board that better reflects Canada's diverse legal profession. This question was

tabled and referred to the CBA National Equality Committee, and will be readdressed at the next Annual Meeting in February 2018. In response to the changes made to the CBA national bylaws, CBA Alberta will be engaging in a governance review. The Governance Task Force was struck over the summer, and has begun its work reviewing our Branch bylaws with an eye towards making updates as dictated by the new national bylaws.

With the fall coming to a close, members are reminded that the deadline to renew your national CBA membership has now passed. If you have not already renewed your national membership, please go to www.cba.org/Membership/Join-Renew to do so. At the same time, you can also review the Portfolio and Portfolio Plus options available to you to enhance your CBA membership. These options give members benefits such as CBA education credits, rebates on approved CBA purchases, and free materials-level memberships to up to three Sections of your choice.

Section registration is also still open for all CBA Alberta members. Section membership provides you with regularly scheduled professional development, as well as opportunities to participate in fun and relaxing networking events with your colleagues. This year, we have expanded our webcasting capabilities to include a total of 38 Sections in Calgary and Edmonton for those members practicing in smaller communities around our province. We have also opened up Section webcast membership to allow members from Calgary and Edmonton to join. This is an excellent opportunity for those that find themselves too busy to attend the lunchtime meetings to participate via live video, and not miss out on the first-rate professional development delivered by our Sections! To register for your Sections, visit www.cba-alberta.com/Section-Reg.

Each new Executive prioritizes outreach to our members, including maximizing delivery of quality sections, connecting with new members and celebrating our many devoted and engaged volunteers. Our Engagement Task Force did excellent work over the summer and we are looking forward to implementing tangible changes to benefit members and volunteers. I often comment that CBA is for you, the members. Our activities at the Executive level are always focused on improving your CBA and what it can offer you. Please contact any executive member when you have an idea – your input is always welcome!

Finally, shortly after this magazine arrives on your desk, nearly 200 lawyers from across Canada will fly to Las Vegas to participate in CBA West, a conference presented in partnership with the CBA BC Branch. The CBA West organizing committee has put together a stellar roster of speakers, including Nevada Bar Association President Gene Leverty, Supreme Court Justice Russell Brown, and the chief justices and judges from all levels of court in Alberta and British Columbia, among many others. It is not too late to register to attend this one-of-a-kind conference November 17 - 19. For more information on the conference, including registration details, discount codes for flights with Air Canada and WestJet, and a full conference schedule, visit www.cba-west.org. I hope to see you all in Vegas, and I look forward to your feedback as we strive to evolve and energize your CBA! 🍷

WHAT'S HAPPENING

NOVEMBER

14: The Canadian Bar Association presents **FEARLESS ADVOCACY: THE CHALLENGES OF REPRESENTING AN UNPOPULAR CLIENT**. Live Webcast. To register, visit www.cbapd.org/details_en.aspx?id=na_onsol717.

17-18: The Canadian Bar Association presents the **ADMINISTRATIVE LAW, LABOUR & EMPLOYMENT LAW CONFERENCE**. Shaw Centre, Ottawa, ON. To register, visit www.cbapd.org/details_en.aspx?id=NA_ADM17.

17-19: The Canadian Bar Association Alberta Branch and British Columbia Branch jointly present **CBA WEST 2017**. Wynn Las Vegas, Las Vegas, NV. To register, visit www.cba-west.org.

23: The Canadian Bar Association presents **UPDATE ON INTERNATIONAL CLIMATE CHANGE LAW AND CARBON MARKETS**. Live Webcast. To register, visit www.cbapd.org/details_en.aspx?id=na_onnov317&utm_source=cba&utm_medium=email.

28: The Canadian Bar Association presents **THINKING ON YOUR FEET: APPLYING IMPROV FUNDAMENTALS TO THE PRACTICE OF LAW**. Live Webcast. To register, visit www.cbapd.org/details_en.aspx?id=na_onsol817.


28: The Ontario Bar Association presents **HOW TO PROTECT YOURSELF FROM LIABILITY WHEN ACTING AS ESTATE TRUSTEE**. Live Webcast. To register, visit www.cbapd.org/details_en.aspx?id=ON_17TRU1128T.

30-DEC 1: The Canadian Bar Association Nova Scotia Branch presents **2017 ANNUAL 2-DAY CONFERENCE**. Lord Nelson Hotel, Halifax, NS. To register, visit www.cbapd.org/details_en.aspx?id=NS_CON2DAY17.

DECEMBER

4: The Ontario Bar Association presents the **9TH ANNUAL CLASS ACTIONS COLLOQUIUM**. Twenty Toronto Street, Toronto, ON. To register, visit www.cbapd.org/details_en.aspx?id=NA_ADM17.

11: The Ontario Bar Association presents **ETHICS, CIVILITY AND ZEALOUS ADVOCACY: HOW DO THEY CO-EXIST?** Live Webcast. To register, visit www.cbapd.org/details_en.aspx?id=ON_17INS1211C.



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CATASTROPHIC INJURY AND WRONGFUL DEATH CLAIMS

JANUARY

18: The Ontario Bar Association presents **SOCIAL MEDIA: HOW MUCH AND WHAT TYPE IS JUST RIGHT?** Live Webinar. To register, visit www.cbapd.org/details_en.aspx?id=na_onsol817.

24: The Canadian Bar Association Alberta Branch and the Law Society of Alberta jointly present the **2018 DISTINGUISHED SERVICE AWARDS**. Calgary, AB. For more information, visit www.cba-alberta.org.

31: The Canadian Bar Association presents **MANAGING THE COST, RISK AND DISRUPTION OF E-DISCOVERY IN COMPLEX LITIGATION**. Live Webinar. To register, visit www.cbapd.org/details_en.aspx?id=NA_LSECL0118X.

FEBRUARY

15: The Canadian Bar Association presents **CBA ANNUAL GENERAL MEETING**. Delta Hotels Ottawa City Centre, Ottawa, ON. Also available via remote hub. More details to come. Visit www.cba.org for more details.

27: The Ontario Bar Association presents **CONTESTED PASSING OF ACCOUNTS**. Twenty Toronto Street, Toronto, ON. Also available by Live Webinar. To register, visit www.cbapd.org/details_en.aspx?id=ON_18TRU0227X.

28: The Ontario Bar Association presents **EXPERT ADVICE ON LAUNCHING YOUR LEGAL CAREER**. Twenty Toronto Street, Toronto, ON. Also available by Live Webinar. To register, visit www.cbapd.org/details_en.aspx?id=ON_18YLD0228X.

MARCH

1: The Ontario Bar Association presents **MANAGING PARTNER ROUNDTABLE: WHAT'S NEW IN PRACTICE FROM LAWPRO**. Live Teleconference. More details to come. To register, visit www.cbapd.org/details_en.aspx?id=ON_18LPM0301X.

27: The Ontario Bar Association presents **TAX UPDATE**. Live Webcast. More details to come. To register, visit www.cbapd.org/details_en.aspx?id=ON_18TRU0327X.

SAVE THE DATE

DEC 14: MARK THE RETIREMENT OF THE RT. HON. BEVERLEY MCLACHLIN, PC, CHIEF JUSTICE OF CANADA. Ottawa, ON.

APR 27: MARK THE RETIREMENT OF THE RT. HON. BEVERLEY MCLACHLIN, PC, CHIEF JUSTICE OF CANADA. Vancouver, BC.

Please send your notices to:
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PATRICIA (PATTY) JOHNSTON, QC, is Executive Vice President, Legal & General Counsel at the Alberta Energy Regulator and has been a regular contributor to Law Matters and its predecessor publications for over 20 years.

DENNIS CALLIHOO

BY WILLIAM TURNER

Dennis Callihoo is a lawyer with 27 years at the bar, an arbitrator and member of the Michel First Nation. Dennis graduated from Osgoode Hall Law School in 1989 and articulated with Leonard (Tony) Mandamin. He was an Assistant Professor at the University of Lethbridge for 1 year before entering general practice in Maskwacis for 8 years. In 1990 he became In-House Counsel for the Yellowhead Tribal Council for 14 years. He continues to work with First Nations in the areas of Justice, Governance, Employment Law and Election related matters.



DENNIS CALLIHOO

Dennis is a past recipient of Premier's Award of Excellence in Justice in 2010 for his contributions to the establishment of the Law Information Centres in Alberta. Prior to that he was also a recipient of Aboriginal Role Model of Alberta Award in 1997 in the Justice Category. Dennis' volunteer service is extensive and he has been recognized by over 35 non-profit organizations including the Legal Aid Society of Alberta, Boyle Street Community Co-op, Canadian Native Friendship Centre and the Edmonton Community Legal Centre.

A desire to work with aboriginal organizations led Dennis to completing his law degree at Osgoode Hall Law School. Acquiring his education at a distance was much like his grandfather Victor Callihoo who attended St. Josephs ("Dunbow") Indian Industrial Residential School south of Calgary in the early 1900's. The Dunbow School was the first of three industrial schools in western Canada, which taught farming skills and the use of machinery including steam engines.

Children (under the Indian Act and related policies) at this time as young as five were forced to attend residential schools. The choices of the time for this area were the St. Albert Residential School where the Callihoo's had "bad experiences" including hygiene, health and overcrowding issues or Dunbow.

It took a 7 day trip by a team of horses and wagon to travel from the Michel Reserve to the High River area for the Callihoo's to visit their son. It was Victor Callihoo who ended the cycle of Residential schools, which began to happen to his own children by forfeiting his native status in 1928. As one of ten families who gave up native status under the Indian Act, they donated a property from this enfranchisement and organized a School District to operate a school for the local community including reserve and off reserve students.

Victor Callihoo was elected as one of the first School Trustees of the Michel School in 1929. The Michel School was open for 30 years until it was closed and amalgamated with the County of

Parkland in the late 1950's. This experience is likely a large contributor of how Dennis developed his view of reconciliation and of working together.

Arman Chak, human rights lawyer and Benchler with the Law Society of Alberta says of Dennis that "[he] provides a voice to those who cannot speak for themselves. More than an advocate, he presents his client's cases in a manner that points to ways in which the situation can be managed better for the future."

After brief consideration, Dennis explains reconciliation as a mutual relationship with a view of reconciliation as a goal to be achieved, "like a step in one direction working together, towards Canadians having a better understanding of aboriginal

people, their history and the significance of Indigenous Treaties." Specifically referring to the Truth and Reconciliation Commission, Dennis believes it is an effort and opportunity to change a past relationship by working together.

Working towards a shift from an adversarial system towards a more inclusive and supportive system, his efforts working in the Alberta Justice Policy Advisory Committee from 2007 to 2011 is one of his fondest experiences. The group comprised of government, justice stakeholders and aboriginal representatives which focused on needed changes to the justice system, re-instilling public confidence in the system for a meaningful benefit for all Canadians.

This experience was "a very good example of working together" in a mutual relationship and stepping in one direction. He is currently on the Board of Directors for the Ermineskin Women's Shelter Society, the Alberta Council of Women's Shelters and the Foundation of Administrative Justice.

On a personal side, Dennis is an avid sports fan, cancer survivor and accomplished musician. As a teenager, he performed at a downtown Edmonton restaurant for two years as a soloist and continues to play for personal enjoyment. He plays classical, popular music, and jazz "lite", "I like my improvisation well planned out" he says with a grin. 🎷

The **Unsung Hero** column is intended to introduce a member of our profession who has demonstrated extraordinary leadership, innovation, commitment, or made significant contributions to social justice and community affairs.

Do you know an Unsung Hero? Tell us about them.

If you know a lawyer who deserves to be recognized, please send us an email to communications@cba-alberta.org with the lawyer's name and the reasons why you believe they are an "unsung hero". The only formal requirements for nomination are that our "unsung hero" be an Alberta Lawyer and a CBA member.

TRUTH & RECONCILIATION: WHAT "WE" DID TO "US"

BY **ROBERT G. HARVIE, QC**

I was born and raised in Southern Alberta.

In 12 years of public school and in 6 years of Canadian University, I learned, well, pretty much nothing about the history of Indigenous Peoples in Canada. I picked things up, but for the most part for a somewhat well-read person, I still knew next to nothing about the details of European expansion into North America, and the pre- and post-colonial history of Indigenous Peoples in Canada. I knew more about the Civil War and the history of slavery in the United States than I did about the interaction between the Canadian government and Indigenous Peoples in my own country.

Then, on June 13, 2014, I was asked to chair a discipline committee of the Law Society of Alberta, regarding David Blott.

Mr. Blott, who was resigning from the Law Society of Alberta, by way of a "consent disbarment", had profited greatly from the residential school settlement process. He, along with other lawyers, basically beat the bushes for Indigenous Peoples who had suffered abuse in the residential school programs, and then, after spending an average of 8 minutes with each person, "represented them" in asserting their claim. I use the word "represented", loosely, because as he admitted, his representation fell far short of actually listening to his clients, and understanding, fully, their pain and loss.

And here was the tragedy. Indigenous Peoples were treated, by government and Churches, like animals. They were rounded up, and penned, away from friends and family, to be "integrated" into "Christian" culture. They were physically, sexually, and culturally abused - leaving long-lasting scars and damage that continued long after they left the schools and the schools themselves were closed - continuing in fact, to the present day.

And then, a member of our profession, started the abuse process anew.

In quoting from my decision, which I read with significant shame as a lawyer and as a Canadian citizen,

"Our profession holds a privileged place in society - as members of the Law Society and as part of the justice system, part of our duty as lawyers is to assure respect for what we refer to as the 'Rule of Law.'

The fundamental tenet of the Rule of Law is that all persons are equal before the law, regardless of personal status, and are entitled to equal protection of the law.

The residential school claims, at their outset, were an example of the very best of our profession - aboriginal people in Canada have historically been a politically disadvantaged and abused segment of Canadian society - a situation that was at the core of sordid history of residential schools in Canada. In light of this abuse, certain members of our profession stood up and said, 'The government of Canada, and others, cannot get away with this... we will help give these people a voice who have, until now, remained voiceless.'

These lawyers stood up and said the Rule of Law requires that the most powerful in our society are not permitted to abuse those who are less powerful - and this ultimately resulted in the Residential School settlement process. A process whereby compensation and reconciliation for past harm could be redressed.

The tragic reality, however, is that what started as an effort at reconciliation and righting of wrongs, under Mr. Blott's direction turned into what can only be described as a factory of gross self-interest, where victims of the residential school system were, effectively, re-victimized and treated less like human beings and more like cattle. They were, in some respects, again dehumanized by a process where the ultimate goal appeared to be making as much money as possible with the least amount of personal attention.

For this, Mr. Blott, you brought the legal profession into the worst form of embarrassment."

It is, I think, important for us as lawyers to have a particular awareness and understanding of the relationship between Church, State and the public. We, as members of a self-governing profession, owe a duty to stand against tyranny, to speak for the voiceless, because if we don't, who will?

This issue of Law Matters is a special issue, devoted to a discussion and examination of the Truth and Reconciliation Commission and its 2015 report and what comes after. I would hope all members of the CBA read this issue, and use it as a spring-board to read the Truth and Reconciliation report. It's a long read, to be sure. And, candidly, when I first looked at it, it seemed, well, too much. But as I began reading, and one page lead to the next, I got caught up in it. It was as engrossing as it was tragic and sickening. And, at the end, I felt both better for having read it, and embarrassed for realizing that I knew so little about my neighbors, about my fellow human beings and how this country abused them so badly.

And here's the thing of it, at least for me...

The fundamental core of the abuse of Indigenous Peoples in Canada was based upon a sense of "otherness", of a distorted tribalism where Europeans felt justified in treating people who were different from them as less than people. Where they felt

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WE CAN HANDLE THE TRUTH: CBA POLICIES IN LINE WITH TRC ACTION ITEMS

The CBA, led by the Aboriginal Law Section and with input from several other sections, forums and committees, responded to the Truth and Reconciliation Commission of Canada's Calls to Action¹ in early 2016.

The CBA submission, coming after much careful consideration of the TRC's 94 action items, can be paraphrased as a fairly unanimous, "yep, we're good with that, and we're willing to help."

"Many of the calls to action are consistent with CBA policies and have our unqualified support," the CBA says in the submission, which received support from the Criminal Justice, Family Law and International Law sections, as well as the Women Lawyers Forum and the Children's Law Committee.

"We plan to continue our efforts to advance those positions, with reference to the TRC work and support for the same policy positions. For several other calls to action, we offer comments and suggestions, in addition to our general support."

Two of the calls to action, #27 and #28, relate directly to the legal profession, calling on law schools to provide courses in Aboriginal people and the law, and on schools as well as the Federation of Law Societies to ensure lawyers and law students "receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights and anti-racism."

The submission notes that the CBA hosts national, regional and local conferences, seminars and workshops that include the kind of training called for by the TRC, and that many law societies have also taken steps to ensure lawyers receive appropriate cultural competency training. As well, while many

¹ "Truth and Reconciliation Commission of Canada: Calls to Action" - <https://www.documentcloud.org/documents/2091412-trc-calls-to-action.html>

cont'd from page 6

justified in exerting the power of the Church and of the State to try and force people to stop being "different", and to either "join THEIR tribe" or at least, to have the decency to quietly cease to exist.

It is common, in discussing the topic of truth and reconciliation, to discuss what "we" as Canadians did to "them" as Indigenous Peoples. And to be sure, as a descendant of European immigrants, I have suffered none of the harm experienced by my Indigenous neighbors, so their experience is not my own.

However, we should, perhaps, take a moment not to use the discussion about reconciliation to reinforce the past idea of "otherness" of Indigenous Peoples in Canada. Because "they" are "us". They are our neighbors, our school mates, our fellow human beings.

law schools do in fact offer courses about Indigenous Peoples, the CBA endorses making those courses mandatory and notes that "given the breadth of the topic, multiple courses might be required."

"Virtually every aspect of the law – from criminal to estates to taxation to employment law – has the potential to be more complex when Indigenous peoples are involved," the submission says. "For this reason, it is imperative that all lawyers understand these issues. Further, a good understanding of Canada's legal system must include the history of our Indigenous peoples and their traditions, and this knowledge is also essential for reconciliation."

The CBA says it welcomes calls to action 42 and 50, which deal with recognizing Indigenous legal traditions, and says it will "continue to work to improve the recognition of Indigenous legal traditions in the legal system and build support for initiatives that acknowledge and advance Indigenous legal traditions in Canada."

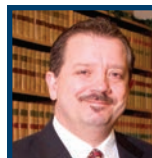
A number of the calls to action deal with the experience of Indigenous Peoples in the criminal justice and correctional systems, items such as mandatory minimums, programs for Indigenous offenders, fetal alcohol syndrome and solitary confinement, which are in line with policy positions the CBA is already working on.

"The CBA applauds the work of the Truth and Reconciliation Commission," the submission says. "The TRC emphasizes a slow and careful approach, with emphasis on getting reconciliation right rather than getting it over."

"This submission illustrates that existing CBA policy is generally in line with the June 2015 calls to action, and we will continue our work to advance those objectives." 🗣️

A version of this article originally appeared in the CBA National Blog on March 24, 2016 (<http://nationalmagazine.ca/Blog/March-2016/We-can-handle-the-truth-CBA-policies-in-line-with.aspx>).

Talk about Truth and Reconciliation is not about some vague history lesson about what some "other" people did to yet some "other" people. Fundamentally, it is about what "we" did to "us" and about how "we" grow from a better understanding of our true history and how "we" move forward as a healthier and more honest society as a whole. 🗣️



ROBERT G. HARVIE, QC, is the past chair of the CBA Alberta Editorial Committee. Rob is also a former bencher of the Law Society of Alberta, and currently practices in Lethbridge at the firm of Huckvale Wilde Harvie MacLennan LLP.

DISCLOSURE OF PRIVILEGED RECORDS

BY TAMARA PRINCE AND ALLISON KUNTZ

Lawyers are more skeptical than the average person.¹ While some might question this conclusion, skepticism may explain why some litigators are reluctant to adhere to the *Rules of Court* when it comes to disclosing privileged records in an affidavit of records.

Lawyers are zealously committed to the protection of privilege. We litigators recall the Alberta Court of Appeal decision in *Dorchak v Krupka*, 1997 ABCA 89 (*Dorchak*), where Justice Côté commented on the description of privileged records under the old Rules and stated (citing *London & Midland Gen. Ins. Co. v Lambert*, [1972] 1 W.W.R. 224, 226 (Alta D.C.)), “[t]here is considerable danger of giving away secrets by describing the individual privileged documents”, and “[t]he description of the documents in the schedule need not corroborate privilege.” This effectively confirmed the practice at the time of simply referring to un-numbered privileged records in Schedule 2 in bulk terms (i.e. “solicitors’ work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitors or their assistants”)—a practice that lingers today despite a change in the *Rules* and clear direction to the contrary from the courts.

So what should a skeptic do?

Rule 5.8 requires that “[e]ach record in an affidavit of records that a party objects to produce must be numbered in a convenient order, and the affidavit must identify the grounds for the objection in respect of each record”.

The Alberta Court of Appeal in *Canadian Natural Resources Ltd. v ShawCor Ltd.*, 2014 ABCA 289 (*CNRL*), stated that, short of disclosing privileged information, “a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim”, thereby confirming the application of Rule 5.7(1)(b) and its requirement of a brief description of the privileged records contemplated by Rule 5.8. The Court confirmed that each privileged record is to be dealt with individually, with bundling still permitted so long as Rule 5.7(2) is satisfied.

Even with the clear direction provided by *CNRL*, many lawyers remain reluctant to list and describe privileged records in an affidavit of records as required by the *Rules*. Are we skeptical that there can ever be a balancing of privilege and disclosure? How can we properly describe the documents in a manner that satisfies the *Rules* but does not somehow also violate the privilege we are duty-bound to protect?

In *Kaddoura v Hanson*, 2015 ABCA 154 (*Kaddoura*) the Alberta Court of Appeal commented on this concern. In that case, the Court stated that the *Rules* are structured to distinguish between “disclosure” and “production”, and that Rule 5.6 requires the disclosure of all records, and while there may be an objection to the production of some of these records, nevertheless they

must be disclosed. In acknowledging the potential validity of the argument that “the mere listing of the client files involves some inroad into privilege”, the Court stated that “the Rules of Court nevertheless require that they be disclosed, even if not eventually produced because of a valid claim of privilege.”

What we can glean from *Kaddoura*, and indeed what was stated expressly in *CNRL*, is that the Courts are of the view that the wording of the *Rules* dealing with disclosure of records should be broadly interpreted in respect of a party’s obligations regarding records over which it claims privilege. In the post-*Hryniak* (*Hryniak v Mauldin*, 2014 SCC 7) legal atmosphere of promoting efficiency, the promotion of a mechanism for parties to assess the validity of privilege claims over disclosable records resonates.

However, in commenting specifically on the implications of *Dorchak* on the new *Rules*, the Court in *CNRL* stated that

“While this Court held that it was not necessary to describe each document or bundle of documents so as to “corroborate the privilege”, a primary concern was that a party not be obliged to cite facts that effectively gave away the privilege. This concern remains valid today. Hence, we emphasize that the obligation to provide sufficient information to indicate how a record fits within the claimed privilege does not require a degree of particularity that would itself defeat the privilege. No doubt best practices by counsel for parties will develop over time to accommodate the new realities”.

Skeptics, let’s take special note of the last line in the quote above... 🗣️



TAMARA PRINCE is a partner in the litigation department in the Calgary office of Osler, Hoskin & Harcourt LLP. She has experience in a variety of litigation matters, including complex commercial litigation and arbitration, energy litigation, class action defence, employment defence, among others.



ALLISON KUNTZ is a partner in the litigation department in the Calgary office of Norton Rose Fulbright Canada LLP. Her practice includes corporate and commercial litigation, domestic and international arbitration, oil and gas litigation, as well as securities and financial services disputes.



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¹ See Dr. Larry Richard, “Herding Cats: The Lawyer Personality Revealed” (August 2002), Managing Partner Forum, online: <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20WEBSITE%20-%20ARTICLE%20-%20Herding%20Cats%20-%20Richards1.pdf>.

LAW SOCIETY OF ALBERTA RESPONDS TO TRUTH & RECONCILIATION CALLS TO ACTION

BY **KOREN LIGHTNING-EARLE**

The Law Society of Alberta (LSA) is committed to responding to the Truth and Reconciliation Calls to Action. Koren Lightning-Earle joined the Law Society of Alberta in late June, 2017 as Indigenous Initiatives Liaison (IIL). Since that time, she has been developing a work plan and strategies for the LSA to respond to the TRC calls to action. This work plan includes internal strategies directed at Law Society staff and Benchers as well as external strategies aimed at both indigenous lawyers in Alberta and Alberta lawyers generally. The strategies have been well received by the LSA benchers and the LSA staff.



The LSA acknowledges that it must lead by example. The LSA President began the Benchers meeting on September 28, 2017 in Calgary, Alberta by acknowledging the Treaty 7 territory and the traditional territory of the Niitsitapi (Blackfoot), Nakoda (Stoney), and Tsuut'ina. The acknowledgement of the land is of great importance to Indigenous Peoples. It was also the first time a report on Indigenous Initiatives was given to the Benchers.

On September 29, 2017 the LSA staff took part in "Orange Shirt Day" in recognition of the harm caused by the residential school system to Indigenous children. The story of Phyllis Webster and the meaning behind "Orange Shirt Day" was shared with all the staff.

All Law Society Staff have been invited to participate in the Kairos Blanket Exercise on October 30, 2017. It will be facilitated by Koren Lightning-Earle, Indigenous Initiatives Liaison and Hadley Friedland, University of Alberta Faculty of Law Professor. There will be a team of Indigenous facilitators brought in for this initiative to help specifically with the debrief circles. The purpose of the Blanket Exercise is to get all staff involved in the reconciliation process. This activity allows people to be physically and emotionally moved and to learn about the history of Indigenous Peoples in an experiential and safe environment.

Reconciliation requires all parties to be involved. The LSA supports the work of the IIL and believes it is of utmost importance. In collaboration with the Communications team, Indigenous Initiatives is developing an internal Blog for staff. It will include resources, daily acts of reconciliation, a question and answer section, resources and blog posts by the Indigenous Initiatives Liaison.

In the spirit of building relationships, the LSA is committed to building relationships with Indigenous lawyers and students.

We want to ask important questions such as what services do we provide to Indigenous lawyers and how can we improve to be a more inclusive organization? The goal is to ensure that current Indigenous lawyers and future Indigenous lawyers know they have a place at the Law Society and that they belong as part of the legal profession.

To support this work, in person meetings are currently being planned with all Indigenous lawyers in Calgary and Edmonton. The objective of these meetings will be to provide an update on the work of the Law Society and to discuss ways in which the LSA can provide more supports to Indigenous lawyers. In addition, the IIL is working on developing relationships with new Indigenous lawyers and looking for ways to support new calls. For example, seeking new ways to incorporate Indigenous Culture into the call to the bar ceremony.

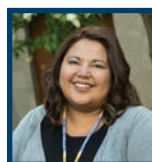
Finally, the IIL is developing relationships with other key stakeholders including both Alberta Law Schools. The IIL will be collaborating with the U of A and U of C Career Services offices on how to provide better supports for future lawyers. This includes support and reevaluation of the Indigenous Summer Student Program.

A vital element of the LSA's response to the TRC calls to action will be education. A number of initiatives are already underway in this area. This includes the development of a Cultural Awareness Training Module for the Law Society Adjudicators and development of Cultural Awareness Training for recruitment staff at Edmonton and Calgary Law Firms who participate in the Indigenous Summer Student Program.

Also, an Internal Education Program at the Law Society will take place, including the creation of a similar program that would become part of the Law Society New Staff Orientation Program.

Ultimately, the goal will be to create a larger education program for all Law Society Members offered by the Law Society. This will be developed over the next year. 🌱

"Inukshuk, stacked stones at Moraine Lake": iStockPhoto.com/ajansen



KOREN LIGHTNING-EARLE is the Indigenous Initiatives Liaison at the Law Society of Alberta. She is also the President of the Indigenous Bar Association, and is a recent recipient of the Alumni Horizon Award from the University of Alberta. Koren is also a sessional instructor at Maskwacis Cultural College.

PERSPECTIVES FROM A COMMISSIONER OF THE TRUTH AND RECONCILIATION COMMISSION

BY CHIEF WILTON LITTLECHILD, QC

The Truth and Reconciliation Commission (TRC) of Canada was established as a result of the largest class action lawsuit in Canadian legal history when former Indian Residential School student "survivors" said "that's enough, we're suing". Thousands of cases against the Government and Churches that ran the schools were eventually settled out of court on four conditions: one of which was a very unique truth commission. Unique because it was established by the courts; the first to look at children and what happens when you remove them from their parents through a legislated assimilation policy. It was also funded by the survivors themselves. As one of the three Commissioners who were tasked to find out the truth of what happened at these schools, how was the experience?

It was very emotionally difficult to listen to thousands of children, now adults, describe their lived experiences. Sometimes through anger, many times through tears. Yet there were days of laughter as they shared the fun times with friends met at these schools that also became extended families. One of my early goals was to seek a balance from the stories. I knew the abuse was there. Having spent thirteen years in three different Residential Schools myself; what I did not know was the serious depth of abuse of children across our country. We heard the most horrific stories of abuse: physical, mental, cultural, spiritual and worst of all, the sexual

abuse. Many times, I was hearing my own story being told in front of me. Those were the times I leaned heavily on my fellow Commissioners: Justice Murray Sinclair and Dr. Marie Wilson. Our debriefs after each day of hearings helped me get through the day along with the health and cultural/spiritual support workers that accompanied us on this journey.

It was very important for me to search for the good experiences, to hear about the good people with the best of intentions that worked at the schools. There were many. Survivors acknowledged them for their contributions; it must be stated, in the words of some, "it was not all bad!". So, what were the bright lights throughout our search for the truth, to determine "not only what of value was lost?" but also "what was gained as a positive experience?" Some stated "I received an education, I learned a new language, I made lifetime friends..." For many of us it was the "Res School sports". Some indicated "if it was not for the sports I would have not made it". For me these were uplifting moments, as I had shed many tears with the survivors. These stories of good times were the positive balance when we could laugh together about how we won in life.

One area which was not in our otherwise very wide mandate, a mandate which was jointly designed by the plaintiffs and the defendants, was about the missing children. We started hearing early about children that "never came home". The many children that died while at the residential schools. Those that ran away, some drowned while trying to cross a river or froze to death in the middle of winter; beaten to death or died from disease not treated. Many families were not able to do our traditional ceremonies as some did not know how their relative died, when they died or where they were buried. We heard of children burying children. So we decided to include this in our report. While our research identified thousands, the work continues so that families can know what happened. They have a right to know.

So, yes it was a challenge but it was also truly a great blessing to have served on the TRC. The second part of our court-ordered mandate was to recommend a pathway to Reconciliation. What do we do with the truth? We take these stories of lived experiences to inform what reconciliation means, what reconciliation looks like and how we can implement "being well" through our calls to action? How do we restore respectful relationships? How do we build a better, more inclusive Canada? At the outset of our journey, my biggest fear was that our report would be ignored, would sit on a shelf somewhere to gather dust. You see, we have had many studies, many reports with thousands of recommendations. What we need now is action. That's why I felt it important to call on Canada for Action, positive action. But critically important for us to succeed is the fundamental need to "work together".

What were the key learnings after six and a half years of the most extensive national consultation in Canadian history? What were the common threads throughout our public hearings from anyone who wanted to appear before us as to how they were impacted by the Indian Residential School policy and what



Former Alberta Queen's Bench Justice, the Honourable Ged C. Hawco, Q.C. has joined I80 Mediation LP.

I80 Mediation LP focuses on Commercial, Family, and Estate mediation and arbitration. Their team includes legal counsel, chartered accountants, chartered insolvency and restructuring professionals, management consultants, and former bankers.

Prior to joining the Court of Queen's Bench, Ged was an arbitrator in the Labour and commercial fields for over 20 years. For the past 10 years he has been a member of the Court's Commercial Division while continuing to hear Family, Criminal, and other matters.

Mr. Hawco can be contacted at gedhawco@i80-group.com

does reconciliation mean to them? This was what made it all worthwhile. I have visited over one hundred communities across Canada since we presented our final report. I am so encouraged by what I am witnessing. How our ninety-four Calls to Action are being studied, worked on, implemented by various sectors of society. Approximately seven thousand stories were shared in culturally appropriate safe settings and with much in-depth research we decided on ten principles of reconciliation. The most amazing focus for me is on the first principle that "the UN Declaration on the Rights of Indigenous Peoples is the framework for reconciliation at all levels and across all sectors of Canadian society" coupled with "All Canadians as Treaty people's, share responsibilities...". We also grouped our Calls to Action under important themes for follow up: Child Welfare, Education, Language and Culture, Health, Justice... Legal Systems.



illness, fetal alcohol spectrum disorder, the gangs, the murdered and missing Indigenous people are all directly linked to the residential school legacy.

What is very encouraging is the willingness and leadership in our justice community; of course, we can always do more, but it is very gratifying to see Police Associations, Law Societies, Judges and other legal professionals across Canada answering the Calls to Action on Justice. I have had the distinct pleasure of working with several groups together with Indigenous leaders to deliberate on how we can best work together on "reconciliation". We know it is not easy but it is so worthwhile. For anyone who wishes to join on this path of reconciliation through our legal profession, begin with reading the 94 Calls to Action, listen for the one(s) that speak(s) to you and start there. Reach out to our Indigenous communities as we want to work together with willing partners. Finally, my personal thoughts are that the Treaties, the UN Declaration and the TRC Calls to Action braided together like sweetgrass are a solution! 🍷

Justice, in my view, has an extremely important role to play in Reconciliation. Many times during this "saddest, darkest and most unknown chapter in Canadian history", it was the police, judges and prison staff who came into first contact with us. Others are the nurses and doctors. Often it was without any knowledge of the impacts of residential schools: the trauma, the addictions, discrimination, racism... I am convinced from our hearings that the high incarceration rates, the violence, the

"Unity Consciousness - Illustration": iStockPhoto.com/stereohype



CHIEF WILTON LITTLECHILD, QC was a commissioner for the Truth and Reconciliation Commission of Canada. Chief Littlechild was the first Alberta Treaty First Nation person to receive a law degree from the University of Alberta, served as a Member of Parliament from 1988 - 1993 and currently runs his own practice from the Ermineskin Reserve.

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EDMONTON'S LEGAL COMMUNITY THEATRE IS OVER THE MILLION DOLLAR MARK - TAKE A BOW!

BY THE HON. MADAM JUSTICE MARY T. MOREAU



Players de Novo's annual performance showcasing the theatrical talents of Edmonton and area lawyers and judges played again to an enthusiastic audience on May 5th at the Victoria School of the Arts in Edmonton. The troupe's 12th season saw total distributions to the Edmonton theatre community rise above \$1 million. This year, *Players de Novo* partnered with Workshop West Playwrights' Theatre to stage *Village of Idiots* by Canadian playwright John Lazarus.

Village of Idiots gathers up stories from life in the "typical" Jewish village of Chelm in Poland. Yosef (expertly portrayed by Mark Facundo, a veteran *Players de Novo* performer) is a deserter from the Russian army, who stumbles into Chelm and soon concludes that he is surrounded by idiots. Yet he gradually sees that wisdom (or for that matter idiocy) is not easily measured, as the Chelmnicks use their unique brand of logic to protect their beloved village from an impending Cossack attack. The result is a heart-warming and hilarious story full of hidden life lessons. Vern Thiessen, Artistic Director at Workshop West Playwrights' Theatre, and Co-Director Troy O'Donnell, a veteran collaborator with *Players de Novo*, transformed a motley crew of 15 amateurs into a tight cast of polished performers supported by the accomplished five-piece Klezmer Band.

Vern Thiessen loved staging this play:

"At first read, it seems silly, but on deeper examination, Canadian playwright John Lazarus has created a parable that speaks to immigration, identity, fear of the strange, and acceptance of simple magic in our lives."

Who will forget the performances of Zalman (Jeremy Schick) and Zlateh (Sarah Rossman) dragging their schnapps wagon across the stage, their load lightening and tongues loosening with each swig of their homemade peach brew laced with garlic. Or the charm and chutzpah of the local Rabbi, expertly played by Jillian Gamez (complete with facial hair). Or the courageous performance of Justice Eric Macklin who conveyed, in few words, the angst of life as a lowly crayfish dressed up as a lobster. Kudos to all the cast who, along with the Klezmer Band members, devoted many hours to turning out a first-rate performance.

Aside from the audible enjoyment of the audience, this annual event brings together people from all walks of the legal profession and theatre community for a very good cause, our local Edmonton theatre companies and the Victoria School of the Arts.

Stay tuned for next year's performance, on 4th May 2018, as *Players de Novo* partner with Catalyst Theatre and Victoria School for our lucky 13th production. 🎭

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RETIREMENT FOR THE RT. HON. BEVERLEY MCLACHLIN



Two events are being planned to mark the retirement of the Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada. To facilitate the participation of people from across the country, one event will take place in Ottawa and the other in Vancouver.

The events will take place on December 14, 2017 in Ottawa, ON, and on April 27, 2018 in Vancouver, BC. More information on each of these events will follow shortly.

BILLED-BASIS ACCOUNTING UPDATE

On September 8, 2017, the government released its draft legislation to implement changes to billed-basis accounting for work in progress. The Canadian Bar Association welcomes the news that the proposal reflects a longer coming-into-force period, where the BBA measure would now be phased in over a five-year period – as opposed to only two years.

This news, along with earlier guidance from the Canada Revenue Agency that the proposed changes would not have any impact on contingency fee arrangements, are improvements over the original proposal – a great win for the CBA.

The CBA is still concerned that the BBA proposal may inadvertently reduce access to justice by making it harder for lawyers to take on work for Canadians who cannot afford to pay the lawyer until the matter is resolved. As the legislation winds its way through the parliamentary process, the CBA will continue to seek more clarity on the application of the CRA guidance to deferred fee arrangements.

SPOTLIGHT ON CANADIAN BAR REVIEW

This has been a busy time for the Canadian Bar Review, with four issues published since the new editors began working in December of 2015, and a new collaboration with the Canadian Association for Legal Ethics to provide a home for papers by junior scholars.

This past summer has seen two special editions of the CBR, most recently with articles stemming from a partnership with the CBA Legal Futures Initiative. In 2016 the CBR teamed up with Futures to host a workshop in Toronto titled transforming Legal Education and Training in Canada: A Workshop to Inspire Change. The workshop brought together a representative group of law students, lawyers, legal educators and legal employers for facilitated discussions about innovation and strategies that can be used to better support lawyers throughout their careers. Building on the education recommendations of the Futures report, the workshop encouraged dialogue about how to ensure that tomorrow's lawyers receive appropriate training for the future to become more effective and fulfilled.

The Futures issue opens Vol. 95 of the Canadian Bar Review. Vol. 94 – the new editors' first full volume of three issues – was capped off by a special issue that was an homage to former Supreme Court Justice Louis LeBel. Authors wrote about Justice LeBel's influence on administrative law, international private

law, solicitor-client privilege, labour law, the law of obligations and to civil law.

One more special edition is planned: this one will focus on the Supreme Court of Canada's decision not to allow the appeal of a Quebec court's decision in the Latif case. Latif is a pilot of Pakistani origin who was denied training on certain planes in Texas after being ruled a security threat – for undisclosed reasons – by U.S. authorities. Manuscripts for the issue were received in April and are currently undergoing peer review.

Meanwhile, the CBR is collaborating with the Canadian Association for Legal Ethics for a contest where articles submitted by junior scholars will be eligible for publication in the Canadian Bar Review, which is the journal most often cited by the Supreme Court. The CBR editorial team welcomes the partnership as a way for the journal to continue shaping discussion on legal questions related to professional responsibility, ethics and legal governance.

Stay tuned for contest and publication details and more updates on the CBR. You can view the Canadian Bar Review online at www.cba.org/Publications-Resources/CBA-Journals/Canadian-Bar-Review.

CALL FOR CONTRIBUTORS TO CBA NATIONAL

Do you want to make a name for yourself in the legal blogosphere? Join our roster of stellar contributors and get your analysis/opinion out there! Our CBA members have a wealth of knowledge and expertise that's worth sharing with the wider world. Find out how you can get involved by contacting Yves Faguy at yesf@cba.org.

PREFERRED SUPPLIERS ARE NOW THE CBA ADVANTAGE

CBA membership has its privileges – including access to a host of exclusive perks and savings, for you and your office.

In the last few months the CBA has overhauled its preferred suppliers program and created CBA Advantage. The main advantage is that we're now more able to tailor offers more closely to individual members – which should mean less news about offers you can't use.

CBA Advantage groups suppliers into new categories:

- **Personal Perks**, which include savings and benefits designed for members' personal use;
- **Practice Savings**, which will give lawyers volume buying power for their practices; and
- **Professional Edge**, with big-picture influencers that will keep you abreast of news, ideas and technology for the legal field.

Personal Perks suppliers include household names like Rogers, Avis, CBIA and Mercedes Benz, among others. For Practice Savings we have worked with companies such as Lenovo, FirstData and Purolator, to name just a few companies with deals tailored to CBA members' needs. The big-picture Professional Edge suppliers include LexisNexis, DAS and ERAssure.

Visit www.cba.org/Membership/CBA-Advantage for more information.

FRONT AND CENTRE

2017 ASSIST WALK FOR WELLNESS



September 7: Fort McMurray, AB



September 14: Calgary



September 12: Lethbridge



September 20: Red Deer



September 21: Edmonton

FRONT AND CENTRE

2017 RACE JUDICATA



Race Judicata is held each year in support of the Edmonton Legal Build for Habitat for Humanity



The next Legal Build takes place in 2020 in honour of Jean McBean, Q.C.



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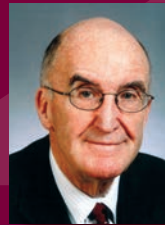
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2017-18 MEMBERSHIP RENEWAL

Your 2017-18 CBA National membership renewal was due on August 31. If you have not already done so, you can renew your membership online at www.cba.org/Membership/Join-Renew. Please note that CBA Alberta Section memberships are contingent upon your CBA National membership dues being paid, and should you not renew your national membership, your Section registrations will be terminated.

Still available to CBA members are the Portfolio and Portfolio Plus enhancements to your membership. These packages provide members with CBA education credits, which can be used towards Section registrations, CBA professional development opportunities, conferences and more. Portfolio and Portfolio Plus packages also offer members up to three free materials-level Section memberships with the CBA Alberta and rebate rewards on approved CBA purchases (which will be taken off future years' membership fees). More information on these packages is available at www.cba.org/Membership/Membership-Information/Branch-Offerings/Alberta.

SPRING 2017 LEGISLATIVE SUMMARY



The Legislative Summary for the spring 2017 sitting of the Legislature is now available on the CBA Alberta website at www.cba-alberta.org/Publications-Resources/Legislative-Summary. Limited printed editions are also available. If you would like to receive a printed copy in the future, please email communications@cba-alberta.org.

CBA WEST

CBA West is just around the corner! Join colleagues from the CBA Alberta and BC Branches at the beautiful Wynn Las Vegas November 17 - 19 for three days of professional development, networking, and the famous Vegas hospitality!

Highlights include:

- Saturday evening gala dinner at the top of the Stratosphere, featuring guest speaker Supreme Court Justice Russell Brown.
- Keynote presentations from Professor Michael Kagan and Nancy Rapoport, both of the University of Nevada Las Vegas, and Gene Leverty, President of the Nevada Bar Association.
- Engaging professional development, with topics including "FinTech - Bitcoin, Blockchain and Other Virtual Currencies," "Trade Law Issues Impacting BC Wine," and "Crossing the Border and Other Places: Cell Phones, Computers & Privacy."
- Judges Panel, featuring Chief Justice Catherine Fraser (Alberta Court of Appeal), Chief Justice Robert J. Bauman (BC Court of Appeal), retired Chief Justice Wittmann (Court of Queen's Bench of Alberta), Chief Judge Thomas Crabtree (Provincial Court of British Columbia), and Chief Judge Terrence J. Matchett (Provincial Court of Alberta).

There is still time to register! Visit www.cba-west.org for registration details, and information on flight savings from Air Canada and WestJet.

2017-18 SECTION REGISTRATION

Section registration is still open for all CBA Alberta members. With recent changes made by the Law Society of Alberta to the CPD Program, it is more important than ever to participate in professional development delivered by your Section of choice.

This year, we have expanded our webcast offerings to include 38 Sections in Calgary and Edmonton. We have also opened up webcasting to make it available to those members who practice in Calgary and Edmonton, so whether you practice outside of the downtown core, or have trouble leaving your office for an hour at lunch, you can now participate in your Sections of choice remotely. Please note that webcast members who wish to drop in and attend a meeting in-person will be required to pay a drop-in fee.

Effective October 31, the grace period for Section registrations has ended. This means that any member who has not renewed their 2016-17 Section memberships for the 2017-18 year will no longer receive Section communications or notices, and will be required to pay a \$25 drop-in fee should they wish to attend any meeting.

If you have not already done so, you can still complete your Section registration online at www.cba-alberta.org/Section-Reg. If you have any questions about your Section registration, please contact Linda Chapman (South) at 403-263-3707 or sections@cba-alberta.org, or Heather Walsh (North) at 780-428-1230 or edmonton@cba-alberta.org.

2018 DISTINGUISHED SERVICE AWARDS



The Canadian Bar Association - Alberta Branch and the Law Society of Alberta are jointly presenting the 2018 Distinguished Service Awards on Wednesday, January 24 in Calgary. Join us as we recognize outstanding legal professionals in our province in the areas of Service to the Profession,

Service to the Community, Pro Bono Legal Service, and Legal Scholarship. More information is available on our website at www.cba-alberta.org/Distinguished-Service-Awards.

KIDS IN MIND PILOT FAMILY LAW PROGRAM & STUDY

Kids in Mind is a free study, run by the Calgary Counselling Centre, and with the support of The Honourable Nancy A. Flatters, QC, Leanne Young, QC and Cyndy Morin, to explore the efficacy and cost effectiveness of a streamlined interdisciplinary alternative to Court in high conflict custody or parenting cases.

The study is currently seeking participants who are engaged in high-conflict cases in the family law practice. A minimum of 60 participants is required.

If you are interested in learning more about the program, or providing the names of clients who are interested in participating in this study, please contact Amy Struyk at Resolve Legal Group at 403-229-2365. The full study proposal is available online at <http://bit.do/kids-in-mind>.

REPORT FROM THE CBA NATIONAL BOARD

BY NABEEL PEERMOHAMED

On September 1, 2017, I officially started my role as a member of the inaugural Board of Directors for the Canadian Bar Association following implementation of Governance Resolution 16-01-A. I am excited to begin this journey of community service for the Canadian Legal Profession. I have also been appointed to the Finance Committee and the Enterprise Risk Management Sub-Committee. I look forward to serving in these capacities, as well as a bridge of communication between the Board of Directors on a national level and the provincial Branch Council.

The CBA Annual General Meeting took place in August 2017. We all met in Montreal and were privileged to have conversations with Presidents from the Bar Associations/Law Societies of England and Wales, Ireland, Northern Ireland, Scotland and the United States. We were also privileged to meet past Presidents and Judges from across the nation presiding in various levels of Court at the President's Dinner. A transcription of the speech from Kerry Simmons, Q.C., incoming President of the CBA, can be found on the CBA website www.cba.org/News-Media/News/2017/August/Speech.

One of the major CBA advocacy initiatives, after consultation with CBA members in August, is the opposition to the Federal

Government's tax proposals. As you are no doubt aware, the Federal Government has proposed tax changes that will impact private corporations, including legal professionals. The CBA has joined with over 50 other businesses and professional organizations to form the Coalition for Small Business Tax Fairness. In early September the CBA launched a letter writing campaign to encourage members to write to their MPs. The CBA, through its website, has provided easy access to a customized letter that members can send to their MPs about how these changes affect them directly. This strategy is a part of a staggered rollout to keep the momentum of messages to the Government. Please take a moment to use the website and the customized letter to write to your MP.

I feel very honored to serve the CBA and I am excited to serve the legal community. I look forward to engaging with all members of the legal profession. 🗣️



NABEEL PEERMOHAMED is the Alberta representative on the Canadian Bar Association National Board of Directors. He practices primarily in the area of insurance defence litigation with Brownlee LLP in Calgary.

2017-18 SECTION REGISTRATION

REGISTER ONLINE AT
WWW.CBA-ALBERTA.ORG/SEC-REG

THE FEDERAL GOVERNMENT'S TAX PROPOSALS HARM THE ELDERLY, DISABLED, AND IMMIGRANTS

BY **ROBERT R. WORTHINGTON**

The July tax proposals that target small businesses have been the topic of much discussion in the media. These proposed rules are supposedly intended to close so-called “loopholes” used by wealthy individuals. However, if these rules are enacted in the form proposed, the collateral damage will extend to vulnerable members of our society, being the elderly and disabled – in particular, those who are beneficiaries of discretionary family trusts. Many immigrants who own small businesses will also be affected. Despite Minister Morneau’s recent assertion that the proposals will not affect “small” businesses, the fact is our firm has several clients with business income in the \$100,000 to \$200,000 per year range that will absolutely be affected if these proposed rules are passed into law.

Trusts can be used for income splitting (or “income sprinkling”) among lower-income family members and maximizing capital gains exemptions on the sale of a business. For example, dividends paid to a family trust can be allocated to family members who are beneficiaries of the trust, taking advantage of their lower marginal tax rates or capital gains deductions. These strategies have traditionally been well-accepted forms of tax planning, and are precisely the things that the Department of Finance is targeting with the proposed tax rules. It is certainly true that these tax strategies are often used to benefit the wealthy. But in my experience, they also benefit middle-class small business owners, family members who have special needs, and aging parents. Many firms have implemented trusts for owners of small businesses to benefit these types of individuals specifically.

The general idea behind income splitting through a trust is straightforward, it is to shift income, often in the form of dividends paid by private companies, to lower-income family members. In the case of a first-generation business owner, there is often an opportunity to provide for aging parents who were perhaps less successful than the younger entrepreneur, by having the trust allocate income to them. Similarly, income can be allocated to special needs children or other family members. Finance Minister Morneau seems to be offended by income sprinkling in general, and the proposed tax rules would generally tax this type of “split income” at the highest marginal tax rate. The exception to this punitively high tax rate would be where the person who receives the income has made a reasonable contribution to the business (which is itself a legal test that is fraught with uncertainty and difficult to apply).

Are elderly parents and disabled or special needs children expected to work in the business in order to avoid being subject to the punitive top tax rate? Under the current draft


of the proposed rules, the blunt answer to that question is “yes”. In fact, if the special needs child happens to be between the ages of 18 to 24, an even stricter test must be met. The special needs child would need be engaged on a “regular, continuous, and substantial basis” in the business activities.



In the writer’s experience, it is not unusual for new immigrants to Canada to own small businesses such as restaurants, drycleaners, convenience stores, or services businesses. This is often because English is their second language, and as such, it is more difficult for them to find jobs as employees than to be self-employed. These types of immigrants are tremendously valuable to the Canadian economy.

They are often great savers, and use their savings to finance their children’s education, who go on to become successful professionals or business owners themselves. By denying the tax planning that was traditionally available in the form of income splitting and potentially accumulating savings in a holding company, Minister Morneau’s tax proposals take money out of the pockets of these hard-working immigrants by denying the tax savings that has historically been available to them. The risk-taking, job creation, and business activities of these entrepreneurial immigrants should be encouraged and rewarded instead of punished.

The tax proposals concerning small businesses have been presented under the guise of tax “fairness”. Obviously, fairness is a subjective term. While the proposals may reach their intended target of the top “one per centers”, they will also needlessly harm the elderly, disabled, and productive immigrants who are business owners – at least if the proposals are enacted in the form presently drafted. That being the case, the tax proposals are, at best, not very well thought through. At worst, they are unfair, blunt instruments.

The examples discussed in this article are just a few of the harmful consequences of the proposed changes to the Income Tax Act. Without a doubt, there will be further collateral damage resulting from these amendments. It is hoped that the Canadian Government will reconsider both the underlying principles and the specific details of these tax proposals. 

“Canadian Pennies”: FreelImages.com/JasonAntony



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RECONCILIATION AND THE HORSEMAN OF RELATIONSHIP

BY CATHERINE M. TWINN, QC

We now know the “truth” of the Indian Residential School System and to a lesser extent, the sixties child welfare scoop. Both systems were the result of the operation of law within non-indigenous institutions. Our profession played a significant part in these co-dependent suffering systems. Multiple generations suffered harm, whose healing and improved justice circumstances will take generations.

Reconciliation is making one view or belief compatible with another towards restoring respectful relations. The Truth and Reconciliation Commission (TRC) found Canada's policy towards Indigenous Peoples to be genocidal and reconciliation was needed. In 2012, Justice Melvyn Green commented on colonialism, discrimination and racism:

To the degree that law is an instrument of colonialism (and it is), Canadians of Aboriginal descent remain as subject to its influence now as they were when European settlers and mercantile interests first invaded these shores and asserted their dominance some four to five hundred years ago. To characterize Aboriginal Canadians as merely "marginalized" is more than charitable to those who occupy the centre of the page. Aboriginal Canadians have relatively little economic or political power. They have been alienated from their land, culture and history through physical and legal coercion, misguided paternalism and discriminatory laws. And they inhabit a legal regime about which they were never consulted and in which they have had no significant input... the Supreme Court acknowledged that "widespread racism [against Aboriginal persons] has translated into systemic discrimination... The SCC's findings from the Canadian incarceration data cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it.

The SCC challenge to alleviate suffering requires ethically whole human beings with decolonized thinking,¹ who reject historical and contemporary colonization – including Charter flagrant “aboriginal self-government” that recreates nonindigenous norms and practices as “self-government”. Consider the discriminatory exclusion from membership by some s.10 Bands of so many Indian children and close family members for economic reasons. This exclusion continues enfranchisement, begun by the federal government's assimilation and termination policies of the 19th-20th centuries; continued today by the Indian Act's embedded discrimination of the marginalized.² Alleviating suffering requires living indigenous spiritual laws – love, truth, honesty, courage, humility, wisdom and respect – to rebalance aboriginal overrepresentation across sorrow systems such as child welfare, legal, prison and medical systems. Mainstream sorrow systems over-represent Western worldviews by responding to the symptoms and stress based outcomes, ignoring the underlying trauma. This exacerbates

continuing grief, loss and trauma that indigenous norms, if properly represented, would recognize and heal. These indigenous norms include Wâhkohtowin, Cree laws governing relationships premised on the recognition that everything is related;³ and Kwayeskastasowin, requiring restorative justice principles and processes. Meaningful reconciliation is healing within individuals, families and communities, requiring justice.

Lawyers are shaped by their profession and its culture. Zimmerman's article, “The Lawyer the Addict”, referenced research following her ex-husband's death by overdose, that codependency (defined as the “loss of inner self”)⁴ begins in law school. Students who mostly start out healthier than other young people experience eroded internal values and resilience in “exchange for grades, honors and potential career income”, with increased depression and addiction, and decreased satisfaction.

Co-dependency continues with the profession's competition and client demands, compounded by preoccupation with process, emotional numbing and economic pressures, including the Indian industry – a lucrative market for lawyers, consultants, and accountants. In 1984-85, the Parliamentary appropriation for “Indians” was \$1.9 billion; March 1995, about \$13 billion; 2016/17, \$9.5 billion just to Indigenous and Northern Affairs Canada (INAC), one of many recipient federal departments.

T.C.W. Farrow (2008) challenged the fundamental expectation – intrinsically codependent – in the dominant model of legal professionalism that lawyers must fervently pursue client interests with unqualified loyalty – whether or not the lawyer agrees with those interests. Codependency, by dehumanizing the actors, enables colonial structures of inequality, injustice and patriarchy, which violate essential dignity, security, and rights, contrary to convergent constitutional and indigenous norms that underpin authentic self-government. Canada's aspirational “Nation to Nation” relationship will largely be shaped by lawyers. Without decolonized thinking, trauma and inequality will accelerate, left to politicians pursuing the “full box” of s.35 inherent rights. Meaningful Reconciliation turns on the degree by which indigenous legal norms are integrated with Canada's founding principles that recognize the supremacy of God and the rule of law. 🗣️

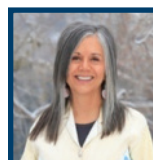
The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Alberta Lawyers' Assistance Society (Assist).

³ Harold Cardinal, *Nation-Building as a Process* (2007); Sylvia McAdam, *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (2015)

⁴ Charles L. Whitfield, M.D., *Co-Dependence – Healing the Human Condition* (1991)

¹ Dr. Michael Yellow Bird, *Decolonizing the Mind*, <https://vimeo.com/86995336>

² *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, Gabriel S. Galanda and Ryan D. Dreveskracht, 2015, Arizona Law Review [Vol. 57:2]; *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555.



CATHERINE M. TWINN, QC. An Alberta lawyer since 1980, Catherine initiated and led a large scale collective impact community and systems' engagement process to reduce the number of aboriginal children in the child welfare system. She is one of Assist's first and current Peer Support volunteers.

NORTH

Kyle Kawanami returns as your veteran Section Coordinator and I am pleased to be joining him in this role. We would like to extend a heartfelt thank you to outgoing Section Coordinator, Davie Hiebert, who will take his experience and dedication to service into his new role as Secretary for CBA Alberta Executive Committee. Kyle and I look forward to working with the Sections. We have some exciting events happening in our Sections and at the CBA in the coming months.

The backbone of our profession is mentoring and the CBA offers a wonderful mentor Mentor Program which matches law students with lawyers to guide and offer practical advice. It helps students see beyond the classroom walls and helps lawyers stay in touch with the concerns and goals of upcoming lawyers. It also gives you a chance to pass on the wealth of knowledge acquired through the practice of law.

Our Sections are off to a great start! Topics to date included 20 forms of ADR in 20 minutes, matrimonial debt, the July 18, 2017 tax proposals and its effects on private companies, online surveillance, and expropriation, not to mention the numerous meeting with members of the Bench. To come we have ADR hosting a mock interest-based mediation on December 13, 2017.

We kindly ask that if you are not able to attend a meeting you'd previously registered for, even if it is a last minute

FROM THE DESKS OF **KYLE KAWANAMI** AND **AMANDA LINDBERG**

conflict, please contact the CBA office at 780-428-1230 or by email at edmonton2@cba-alberta.org to let CBA staff know. This greatly assists the section executives, the presenters and members who would like to attend the meeting. Also remember that many of these sections are available to members outside Edmonton via webcast.

By now, you've likely enrolled yourself in your preferred section(s). If not, this is a friendly reminder to ensure that you get the most from your membership with the CBA. And we encourage you to reach out to your sections' Executive with topic ideas throughout the year. Kyle and I will be attending Section meetings throughout the year. Please feel free to reach out with any comments or questions you may have. In the meantime, happy sectioning! 🗣️



KYLE KAWANAMI is a partner at Emery Jamieson LLP, where he practices in the area of civil litigation with an emphasis on creditor and debtor law. Kyle has served on the Creditor & Debtor Law and Junior Lawyers executives, and is currently a member of the Edmonton Law Day Committee.



AMANDA LINDBERG is an associate at Main Street Law LLP, where she practices construction, corporate, employment, family and personal injury litigation. Amanda is also a long-time volunteer on the Edmonton Law Day Committee, and has previously served on the Executive of the Civil Litigation Section.

SOUTH

We are off to a good start for the 2017-2018 CBA season! Welcome back to all of our valued CBA members and a warm welcome to those who have decided to join the CBA. We are very pleased to see that Section enrolment is doing well. We hope this CBA year will be a rewarding one for you professionally and personally; one where you will expand your knowledge and expertise of the law and build new relationships.

Section meetings have started with the help of our dedicated and hard working executive volunteers who ensure interesting issues, subjects and topics are addressed and presented to their Section members on a monthly basis. Some Sections are even opening the year with a networking social event. We encourage you to assist your Section executive members by informing them of specific subject matters you would like to have discussed or of individuals you know who would be knowledgeable guest speakers for your Section. Also, never underestimate your own experience! Feel free to get in touch to discuss the potential of you acting as guest speaker for your Section.

The first CBA Alberta Branch Council meeting of the 2017-18 year took place on October 12 at the CBA office in Calgary. In addition to Council members, all committee and Section chairs and co-chairs were invited to participate. This was an excellent opportunity to engage with the CBA on topics such as governance and advocacy, and to set the general direction

FROM THE DESKS OF **ANDREW BATEMAN** AND **BIANCA KRATT**

for CBA Alberta. The next Council meeting will take place on Wednesday, January 24, 2018 in Calgary, and will be preceded by the 2018 Distinguished Service Awards. We encourage all our Section and committee chairs to attend. Watch your emails in early January for more details.

As CBA Section Coordinators, Bianca Kratt and Andrew Bateman are ready to assist with the orderly operations of the South Sections. Should you have any questions regarding your Section meetings, concerns about speakers' availability, or if you want to discuss how to improve the delivery of service to your Section members, please do not hesitate to reach out by contacting Bianca Kratt at bkratt@parlee.com, Andrew Bateman at abateman@felesky.com or Linda Chapman at the CBA Calgary Office at sections@cba-alberta.org. 🗣️



ANDREW BATEMAN is a partner at Felesky Flynn LLP, where his practice includes personal tax planning, corporate tax planning, commodity tax, trust and estate tax planning, and tax representation and litigation. Andrew is a past chair of the Tax Non-Specialist Section.



BIANCA KRATT is an associate with Parlee McLaws LLP in Calgary, where she practices in commercial and residential real estate, and corporate commercial law. Bianca previously served as the Chair of the Membership Committee, and sits on the Executive of the Real Property Law - Residential Section.

UNIVERSITY OF ALBERTA

The University of Alberta Faculty of Law is alive with discussion and action relating to Truth and Reconciliation. Many of the programs launched in the last two years are first of their kind in Canada and the faculty is viewed as a leader for law schools across the country. In early September, our first-year students participated in a KAIROS blanket exercise, a two-hour interactive activity designed to walk students through hundreds of years of Indigenous and Canadian history. This exercise vividly depicts the process by which Canada implemented laws and policies that systemically dispossessed and marginalized Indigenous peoples. Students describe the exercise as “powerful”, “impactful”, and “successful in setting the tone” for the learning of Indigenous perspectives throughout future course material.

In addition to the inclusion of Indigenous perspectives in core courses, there are a wealth of opportunities at the Faculty of Law to engage with Indigenous laws, including: volunteering with the Indigenous Law Students' Association; participating in the Kawaskimhon Moot; and engaging in courses, such as: Indigenous Laws: Questions and Methods for Engagement, Aboriginal Peoples and the Law, and the Gladue Seminar and Externship.

A spring 2017 experiential course, Wahkohtowin / Miyowicehtowin Principles and Practice, paved the way for land-based Indigenous law courses. Fifteen University of Alberta students travelled to Susa Creek, Alberta, and engaged with

BY AREEZAH JIWA AND BERNADETTE MCMECHAN

Cree legal traditions through tanning a moose hide, learning from Elders, and working on a group project with the youth of the community. The relationships fostered throughout this course continue to flourish as the Susa Creek youth recently visited the University of Alberta campus, and participated in the Reconciliation/Wahkohtowin Conference hosted by the Centre for Constitutional Studies and the Faculty of Law.

If you are seeking daily food-for-thought and suggestions for action, read and share our Reconcili-Action YEG blog. This blog, a project of the Law and Social Media course, focuses on the Truth and Reconciliation Report and Calls to Action and aims to create a forum for discussion and collaboration where reconciliation initiatives can be inspired and critiqued (ualbertalaw.typepad.com/).



AREEZAH JIWA is the CBA Student Co-Chair at the University of Alberta. She actively volunteers on and off campus through student groups and within the community. This past summer, Areezah went to Dubai to compete at the Jubilee Games, representing Team Canada's women's basketball team.



BERNADETTE MCMECHAN was a former teacher with the Edmonton Public School Board. She is currently a second-year student at the University of Alberta Faculty of Law. In addition to her role as co-chair of the CBA Student Section, Bernadette is also an active member of the Indigenous Law Students' Association.

UNIVERSITY OF CALGARY

And just like that, the semester is nearly over. We welcomed the Class of 2020 into our ranks as first years and had a very successful Orientation Week with them, followed by the Calgary Curriculum three-week block course on foundational legal skills such as memo writing, legal analysis and oral advocacy. The course was wrapped up with each student doing an oral advocacy presentation to their professors and TAs and we had them practicing in advance with our upper year students for extra practice. This year of students promises to be just as committed and successful as our previous years. As always, thanks to our holistic application process, we have a varied and interesting class entering our Faculty this year. We look forward to seeing how these students progress over the next three years.

Our Career & Professional Development Office (CPDO) has been very busy working with the Society of Law Students to bring us our two large annual networking events: Career Day and the Nexen Mixer – both of which had hundreds of attendees. We really appreciate the efforts of our student government volunteers and the CPDO in pulling off these events which help our students integrate into the legal profession and workspace. Further, our second-year students of the Class of 2019 are entering into the 2L Recruit and have had much support from upper year students and the CPDO in preparing for what is sure to be another successful recruit for the Faculty.

BY SARAH MILLER AND HOLLY WONG

The McGillivray Moot is in full swing, and we look forward to hearing about credit moot placements in the coming weeks. Last year we had some excellent second year students who participated successfully in our credit moot program and we look forward to building their skills as well as giving an excellent learning opportunity to some new faces.

In October, our Faculty hosted Wrongful Convictions Day with special guest David Milgaard and a panel of professionals speaking on wrongful convictions risk, procedure and policy. David was convicted for rape and murder in 1970 for what we now view as a questionable prosecution and later exonerated for the crime in 1997 after serving 27 years in jail for a crime he did not commit. The event was an excellent learning opportunity for our students, especially those who are in our Criminal Justice Clinical course.



SARAH MILLER is currently in her third year at the University of Calgary. In addition to her role as co-chair of the Law Student Section, Sarah is involved in the campus community through the Ambassador program, the Student Animal Defense League Fund, and Student Legal Assistance.



HOLLY WONG is third year law student at the University of Calgary, and Co-Chair of the University of Calgary Law Student Section. Previously, Holly obtained her MA from the University of Calgary.

TRUTH & RECONCILIATION PRO BONO SERVICE TO INDIGENOUS COMMUNITIES

BY **KENDALL MOHOLITNY**

The TRC Recommendations provide the opportunity for dialogue – a dialogue that extends to how indigenous communities can access legal services and what lawyers can do to provide pro bono assistance.

Grace Aujer is the Staff Lawyer for Legal Aid Alberta at the Siksika Nation, and is a member of the Bigstone Cree Nation. From her perspective, the TRC have brought attention to the urgent need for change. The TRC discussion is an opportunity to bring issues to the forefront and to provide background in indigenous history. She believes the TRC dialogue will give “lawyers and people who work in the court system a broader understanding and more compassion when dealing with indigenous clients and representing them in court.”

In her experience working with indigenous clients, Grace has found that there can sometimes be a lack of trust and a fear of authority. In her view, trust is the key. Her advice to lawyers providing pro bono service to indigenous clients is to take more time with each client, and to clarify that they understand what was just discussed. Helping clients to understand the legal language and consequences of decisions is particularly important where trust is an issue.

Corie Flett, a practitioner in Fort McMurray, has provided free

legal services and clinics to First Nations communities near Fort McMurray, including Conklin, Janvier, Fort Chipewyan and Fort Mckay. She has also worked with elders in First Nations communities near Anzac to address the needs of their populations. As a member of the Athabasca Chipewyan First Nation and a lawyer engaged in pro bono service to indigenous communities, Ms. Flett believes that enhancing service to these communities is essential. She says, “it is important to support indigenous communities through pro bono service given the ever-increasing gap between need and services, to ensure and protect the interests of some of the most vulnerable populations in our region.”

For lawyers interested in access to justice for indigenous communities, Calgary Legal Guidance has a new program, Sahwoo Mohkaak Tsi Ma Taas (Blackfoot for “Before Being Judged”). For more information about the program and how you can get involved, contact Tyler Makinaw: MakinawT@clg.ab.ca.



KENDALL MOHOLITNY, LL.B., is the Executive Director of Pro Bono Law Alberta. She was formerly the co-chair of the CBA Alberta Access to Justice Committee from 2015 - 2017.



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REFORM MATTERS

BY LAURA BUCKINGHAM

“Do you believe in God?”

“Have you ever attended Church?”

“How many times do you think you might have gone to church?”

Many of us would probably feel offended or upset if a stranger asked us these questions at a party. Imagine how a child would feel if a judge asked her these questions in a courtroom. Yet Alberta law still requires a judge to investigate a person's religious beliefs if there is a question about whether the person is competent to give evidence. The Alberta Law Reform Institute (ALRI) will soon release its final recommendations to address this issue in the *Alberta Evidence Act*.

On occasion, a court must determine whether a proposed witness is competent to give evidence. The question arises frequently in criminal proceedings, but might arise in nearly any kind of proceeding. For example, consider the following scenarios:

- A thirteen year old child is the subject of child protection proceedings. A lawyer is representing the child. Before the hearing of an application for a permanent guardianship order, the child tells his lawyer he would like to give evidence at the hearing, to tell the judge his wishes.
- An adult with a developmental disability is injured in a slip and fall accident on private property. A litigation representative for the adult brings an action against the property owner. Before questioning, the property owner's lawyer indicates she will question the litigation representative, and also wants to question the adult about the circumstances of the accident.
- Two corporations have a dispute about interpretation of a contract. They submit the dispute to arbitration. The individual who negotiated the contract for one of the corporations is expected to give evidence, although she has recently retired. Before the arbitration begins, she is diagnosed with mild dementia. She can remember things that happened in the past, but becomes confused easily and has difficulty concentrating.

Will any of these potential witnesses be able to give evidence? Under Alberta law, the answer depends on whether the proposed witness understands the nature of an oath. A judge or decision maker must conduct an inquiry. Determining whether a person understands the nature of an oath requires a decision maker to investigate a person's religious beliefs. In the past, proposed witnesses have been asked questions like “Do you believe in God?” or “What would happen if you didn't tell the truth after you had taken an oath?” These types of questions can be upsetting and confusing, and are also mostly irrelevant to the person's ability to give evidence.

ALRI considers this test to be outdated, difficult to apply, and overly intrusive. It is also out of step with other Canadian jurisdictions. In particular, it is out of step with the *Canada Evidence Act*, which applies to criminal proceedings and other matters within federal jurisdiction.

ALRI has been reviewing the *Alberta Evidence Act's* approach to determining whether a witness is competent to give evidence. The project will be completed this month with the publication of *Competence and Communication in the Alberta Evidence Act: Final Report 111*.


Consultation is often an important part of ALRI's law reform projects, and this project illustrates the value of consultation. Our Report for Discussion included some preliminary recommendations that would have borrowed a concept from the *Canada Evidence Act* and added it to the *Alberta Evidence Act*. As part of our consultation, we presented the project at CBA Alberta section meetings. At one meeting, attendees raised questions about these preliminary recommendations. The questions made us look at the issue again. After some further work, we concluded that our preliminary recommendations had the potential to create new problems if implemented. We were able to find a new approach that works better in the context of Alberta law. Our Final Report will include some new recommendations for our made-in-Alberta solution.

In the Final Report, ALRI recommends reforms that would:

- Facilitate the reception of relevant evidence;
- Avoid arbitrary distinctions based on age, religious belief, or other personal characteristics;
- Provide flexibility to accommodate individual's particular abilities or needs; and
- Align practices for determining witness competence under the *Alberta Evidence Act* and the *Canada Evidence Act*. While the legislation would not be identical, courts and decision makers could use the same procedures in all cases.

The report discusses the effects these reforms would have on giving evidence by affidavit, at questioning, before a tribunal, and in court.

The report also makes recommendations to address a gap in legislation that may affect witnesses who use alternative means of communication. The recommendations would help those who have difficulty communicating verbally and may use various methods or technologies to communicate, such as speech generating devices, writing, letter boards, pictures, gestures and body language, or others.

Subscribe to our mailing list at bit.ly/alri_news to stay up-to-date with this project and other law reform news in Alberta. 



Website: www.alri.ualberta.ca
Email: reform@alri.ualberta.ca
Twitter: @ablawreform



LAURA BUCKINGHAM serves as staff counsel at ALRI. Before joining the Institute, she practised litigation and employment law in Calgary. Laura holds a Bachelor of Arts with Honours from the University of Alberta and Bachelor of Laws and Bachelor of Civil Laws degrees from McGill University.

HERSH E. WOLCH, QC: 1940 - 2017

BY SARAH E. VAUDRY

Hersh Wolch, QC was born in Winnipeg on April 18, 1940. He lived in eight decades and practiced law in six of them. On July 17, 2017 at age 77 in Calgary, while expected to be in court a few hours later, he passed away.

Many readers will know, or know of, Hersh Wolch QC. His contributions to the law and the administration of justice are very well known. There is no question that Hersh is amongst the most highly respected and valued contributors to the legal profession across Canada and internationally. He was one of very few lawyers to become a household name.

Hersh's professional qualifications, honours, and achievements are remarkable. He graduated law school from the University of Manitoba in 1965 and was called to the bar that same year, the first of 52 busy years in practice.

Hersh spent his first eight years as a prosecutor, first for the Province of Manitoba and then for the Federal Department of Justice. He was the Director of the Bar Administrations Course for Manitoba and was the Director of Education for the Law Society of Manitoba. He was President of the Manitoba Trial Lawyers' Association as well as a board member of the Canadian Association of Criminal Defence Lawyers and a Member of the Reform of the Criminal Law (International Society). Hersh was a Fellow of the American College of Trial Lawyers and a Member of the International Society of Barristers. He was appointed Queen's Counsel in 1982. He appeared before every level of court in Canada and assisted clients across the world. He called evidence in the Supreme Court of Canada where they literally had to renovate to accommodate the rare event.

Throughout his career, Hersh was a mentor to countless lawyers, judges, and anyone else who ever needed advice or direction, across the country. He always made time for people who needed him. Never a pretentious man, he remained humble and continued working in law until and including the day he died.

Hersh's mark on the law itself is found in abundant case law. It is

found in the *Charter*. It is also, and perhaps more broadly felt, in the personal relationships he built with everyone from all origins whether the Chief Justice, a destitute client, or amongst the hundreds who worked with him over the decades as lawyers, students, and staff. I was fortunate to work as support staff for Hersh for five years in the same office that continues to carry his name. I worked for Hersh when his son Gavin first came to work with his dad – a special relationship that I was privileged to see.

Hersh had an uncanny ability to pursue and implement justice for people in all walks of life. He is best known for his work with the wrongfully convicted and the lives he saved – the battles he fought for people feeling hopeless, as a loud voice in a world that didn't want to listen. He made people listen, and made them want to hear more.

In one way or another, even if they didn't know him that well, law professionals aspired to meet a certain standard that Hersh set. This was obvious every time a lawyer called; defence, crown or otherwise; whether his position was agreed to or not, there was always a high regard for his opinion. He set precedents and everyone knew it; in many ways, he was the precedent. Hersh's ability to take on a challenging case or problem, and to recognize simple solutions for impossible situations seemed effortless. That effortlessness came with a contagious sense of calm. His mere presence made people not only feel comfortable but comforted. Hersh's clients, no matter what they faced or how anxious they were, felt at ease knowing they were in great hands, they trusted him completely.

It may not be widely known that Hersh did an exceptional amount of pro-bono work. He fought to provide access to justice for those who weren't economically sound, in many cases by simply doing it himself. He didn't just represent his clients for their case before the courts, he represented his clients for their families' sake, for their truth, for their story to be heard and for protection of their fundamental rights. He firmly believed every individual and the administration of justice itself deserved strong, open minded advocacy – believing in the presumption of innocence to his core.



While I worked with Hersh I never saw him close his door. The only time that happened was if someone else went in and closed it to get his advice privately. He never said he was too busy to deal with other people's problems even when they walked in without warning. There was no division between lawyer and assistant, lawyer and client, lawyer and lawyer. His nature and character bridged what might be expected to be a divide. In his office, everyone was treated equally with the same respect. No one simply wanted to keep a job with him; they wanted to work with him.

Regardless of the subject matter, Hersh's commentary was direct, to the point and phrased in way that would change the course of how a person was thinking in that very instance. He asked the right questions to lead you to realize things for yourself. That was his teaching method. He reprogrammed how those around him would think so they could solve the next problem themselves. More than once he was called Yoda.

When I answered the phone at the office it was normal for clients, or prospective clients, to start off saying, "I want to speak with the best lawyer in Canada" or "I'm told Mr. Wolch is the best in North America". Calls would come in from all over the country, or other countries, looking for Mr. Wolch. Lawyers, students, and Judges called him regularly for advice and he gave it right away. He inspired many to enroll in law school. He performed high-risk hostage negotiations. His passion for law and his ability to distinctively recognize right from wrong – are two reasons he became a criminal defence hero and a legend while he was still alive.

Anyone who worked with him will remember Hersh for his infectious, sometimes mischievous laugh, his instant wit, his love of golf, tennis, bridge, solitaire and travelling. His voice echoes for so many. I know it does for me.

Anyone who knew Hersh would know his kindness. I recall when I brought my young son to the office Hersh would sneak him 20 dollars and tell him to buy whatever he wanted. He adored children and spoke lovingly of his, and his grandkids, all the time.

I laughed when I first started with the firm, at the look of someone without a superficial bone in his body. His hair had a mind of its own, he wasn't shy to wear whatever was comfortable outside court hours, and his desk was always piled with files. That laugh blended into a recognition of his charm, charisma and the brilliance that radiated from within.

An attribute of Hersh's personality that still resonates with me, four years after I moved away, is the absolute love that he had for his family. Every day a combination of his kids, wife, sister, or cousins would call the firm during business hours and request to speak with Hersh or "Dad." Hersh always dropped what he was doing, the tone in his voice would noticeably change and adoration would ascend with undivided attention. He was the kind of man people yearn to have as a father or grandfather and it is an injustice that there aren't enough to go around.

It was an honour and a privilege to work with Hersh Wolch and just the same to share with an audience what I feel captures the legacy left by a giant of a man.

Hersh Wolch Q.C. exemplified the highest ideals of family and professional values with a social conscience. His legacy survives in his loving wife, Justice Sheilah Martin of the Alberta Court of Appeal, seven children (three of which are lawyers), four grandsons, and the countless lives he made better.

To those who knew him, to have known and worked with him, he will be deeply and forever missed. 🕊️

JUDICIAL UPDATES

COURT OF APPEAL OF ALBERTA

The Honourable Madam Justice P.A. Rowbotham (Calgary) has elected to hold office as a supernumerary judge effective August 31, 2017.

COURT OF QUEEN'S BENCH

The Honourable Madam Justice M.C. Erb (Calgary) has retired as a supernumerary judge effective August 31, 2017.

The Honourable Mr. Justice A.D. Macleod (Calgary) has elected to hold office as a supernumerary judge effective August 31, 2017.

The Honourable Madam Justice J.B. Veit (Edmonton) has retired as a supernumerary judge effective September 9, 2017.

Steven N. Mandziuk, QC has been appointed a judge of the Court of Queen's Bench of Alberta in Edmonton, effective September 29, 2017.

Master Walter Breikreuz (Edmonton) has retired as an ad hoc Master effective September 30, 2017.

PROVINCIAL COURT OF ALBERTA

The Honourable Judge Derek G. Redman has been designated as Assistant Chief Judge of the Southern Region, effective September 20, 2017, for a term of 5 years.

The Honourable Judge M. Joanne Durant has been designated as Assistant Chief Judge of the Calgary Criminal Division and Calgary Region, effective September 20, 2017, for a term of 5 years.

The Honourable Judge Gordon W. Sharek has been designated as Assistant Chief Judge of the Civil Division, effective September 20, 2017, for a term of 5 years.

Part-time **Justice of the Peace F.R. Roy** (Edmonton) has been designated as full-time effective September 25, 2017.

A VIEW FROM THE BENCH

BY THE HONOURABLE JUDGE A.A. FRADSHAM

My admittedly idealistic view of the role of a judge in the judicial system does, I confess, occasionally get buffeted about. Reported lapses in judicial conduct, my own failings, and external attempts to politicize the bench, all sadden me, and to some extent chip away at the “image” I have of those who are chosen to occupy judicial office. I deal with those strafings of my Camelot-like fortress by concentrating my efforts at improving my own judicial performance. I am certain that I am not much different from most of the men and women who serve on Canadian courts.

However, my coping mechanisms suffered system failure upon my learning of the Ohio judge who was shot as he was walking from his vehicle into the Steubenville court house. Such an attack is disturbing in the extreme, but how the event concluded is what caused me to wonder if I had been transported to another dimension.

The learned, though wounded, judge returned fire, as did a passing probation officer. Between the two of them, the assailant was killed.

So both the judge and the probation officer went to work that day carrying firearms. Perhaps the standard condition in a probation order (i.e., “keep the peace and be of good behaviour”) needs to be amended to read “be of good behaviour because I am carrying a piece”.

The subsequent press reports stated that in the United States

the number of judges who carry firearms while working in their capacity as judges is increasing. In a National Post article of August 27, 2017, the author noted that the State of “Tennessee in 2011 allowed judges to carry weapons into their own courthouses after 16 hours of initial training and eight hours repeated a n n u a l l y . The training requirement was later repealed.” The article further noted that the States of Ohio and Wyoming permit judges to carry guns into their courtrooms.



In 1612, Sir Francis Bacon wrote his essay “Of Judicature”, in which he said that “an overspeaking judge is no well-tuned cymbal.” If a judge who frequently shoots from the lip is not a properly functioning instrument of justice, then a judge who actually shoots from the hip would seem no better suited.

The power of a judge to summarily find a person in contempt of court truly does take on a new, and exquisitely conclusively, non-appealable meaning if it is backed up by judicial artillery.

Sometimes, when the lawyers in front of them become a bit “difficult” in their courtroom conduct, presiding judges have been known to issue “warnings” to the lawyers about behaviour. These warnings are often characterized around the judicial lunch room table as “firing a warning shot across the bow”. I have always thought that phrase to be a metaphor; I see that in the future I may have to make further enquiries to ensure it is not a literal description.

I have to say that gun-toting judges constitute yet another jurisprudential practice I prefer not to import north of the 49th parallel. Without doubt, the very foundations of my understanding of the judicial role will be badly shaken if, when I enter the courtroom, I hear the Clerk call the Court to order, and then announce that “this is not a drill; I repeat, this is not a drill; it is a live round proceeding!”

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THE HONOURABLE JUDGE A.A. FRADSHAM is a Provincial Court Judge with the Criminal Court in Calgary. His column “A View From the Bench” has been a highlight in the Canadian Bar Association newsletters for over 15 years.

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WILL SEARCH. Dan Murowanyj, late of Edmonton. Born April 19, 1965, died August 3, 2017. **Contact Meghan Murowanyj at 780-450-4109 or megmu@shaw.ca.**

NON-PROFIT ANNOUNCEMENTS

KIDS IN MIND PILOT FAMILY LAW PROGRAM & STUDY. Kids in Mind is a free study, the aim of which is to explore the efficacy and cost effectiveness of a streamlined interdisciplinary alternative to Court in high-conflict custody or parenting cases. The study is currently seeking participants who are engaged in high-conflict cases in the family law practice. A minimum of 60 participants are required. The study proposal is available in full online at <http://bit.do/kids-in-mind>. If you would like to provide the names of clients who are interested in participating in this study, **contact Amy Struyk (Resolve Legal Group) at 403-229-2365.**

THE ALBERTA LAWYERS' ASSISTANCE SOCIETY is hosting an AssistFit weekly yoga class in Calgary. The class takes place Tuesday evenings at 5:30pm at the Fifth Avenue Club. **For more information, visit www.albertalawyersassist.ca.**

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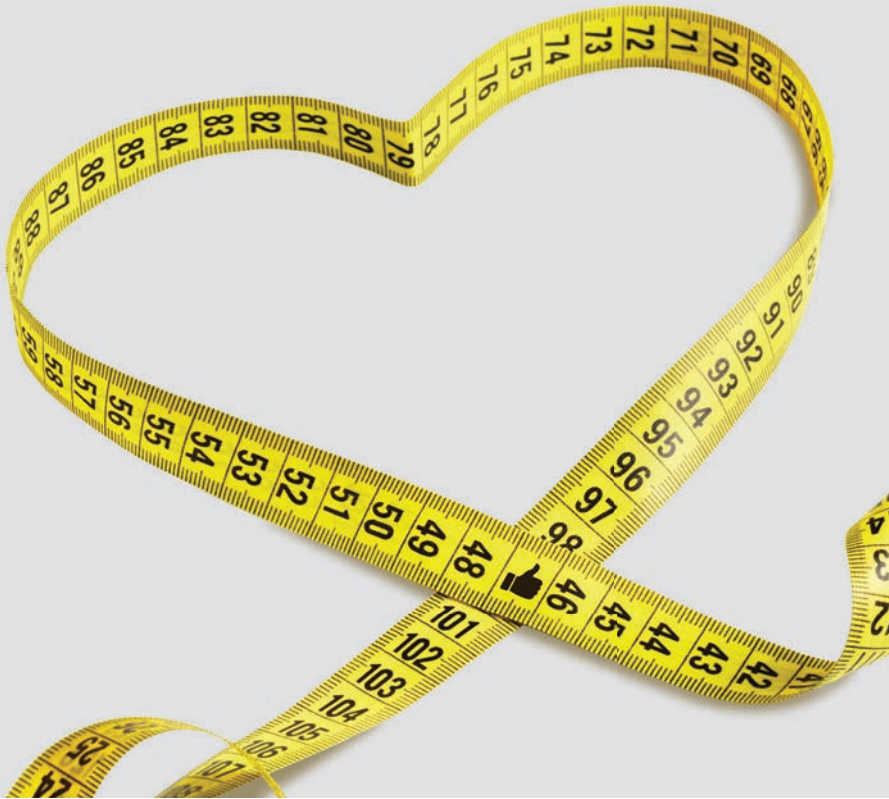
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