

Law Matters

Practicing in a Changing Legal Economy

9 Emerging Truths About Legal Service Delivery

The "Un-Law" Firm

Cognition to Axiom

Futures for Young Lawyers

Do Law Differently



EDITOR'S NOTES

By Robert Harvie, QC

"There is no reason anyone would want a computer in their home." (Ken Olsen, founder of Digital Equipment Corporation, 1977)

In the late 1980's, Digital was a computer giant, with profits of some \$14 billion. By the end of the 1990's Digital was no more. This example was used as a metaphor for those in our industry who may choose to cling to old business models in an online lecture from the Harvard School of Business on "Disruptive Innovation" which was, ironically, brought to my attention by issue contributor Jordan Furlong. I saw his tweet, clicked the link, and was suddenly sitting in on a morning presentation at Harvard University.

Cool.

This issue brings to our attention the need for adaptation and change in the legal profession, and I would encourage readers to drink in the thoughts and ideas of this issue - and embrace, not fear, the change that will transform our profession in the coming years.

And while the "digital evolution" may be a part of that change, at the same time, there is perhaps a growing "personal revolution" that is just as big or perhaps bigger.

While computers may facilitate a more efficient delivery model with more client "value", as discussed by Timothy Burnham, and embraced by Axiom Global - at the same time, they're not able to see the need for humanity and compassion so embodied by Darryl Aarbo, Q.C., our "unsung hero" who reached out to assist those in the LGBTQ community at a time where that was less accepted

and supported. Computers don't comprehend the "value" of collaboration and cooperation in finding civil solutions to legal disputes advocated by Maureen Killoran, Q.C. and Anne Kirker, Q.C. The necessity for lawyers to be "people" will most certainly continue.

Speaking of unsung heroes: Anne Kirker who has been a regular contributor to Law Matters for some time will now be required to focus her duties on the monumental task of being Law Society President, and likewise, Gillian Marriott, Q.C. steps down as PBLA Executive Director as she prepares as incoming Law Society President. Much thanks from the profession for all of their work, and for the work yet to be done in their new roles - and a personal thank-you for the opportunity of working with them and enjoying their friendship during my own tenure as a Bencher.

Lastly, a note about the newest addition to *Law Matters*. For many years, we have offered the "Practice Pointers" column, which has largely focused on barristers' practice. Beginning this issue, we are pleased to introduce the "Solicitors' Shorts" column, contributed by Devin Mylrea. You will also notice that the "Practice Pointers" column has been renamed to "Barristers' Briefs". We look forward to any feedback from our readers about this new introduction to our publication. 📧

Correction:

(from Winter 2015-16) The "Practice Pointers" column was incorrectly credited to Lara Mason and Samantha Jenkins. The correct contributor is Lily Anne Wroblewski.

In This Issue...

PRESIDENT'S REPORT.....	3	SECTION PROFILE: SOGIC.....	12	PRO BONO LAW ALBERTA.....	22
WHAT'S HAPPENING.....	4	CBA NATIONAL NEWS.....	13	LESA.....	23
LEGAL SERVICE DELIVERY.....	5	FRONT & CENTRE.....	14	ALRI.....	24
BARRISTERS' BRIEFS.....	6	ALBERTA BRANCH NEWS.....	16	IN MEMORIAM.....	25
UNSUNG HERO.....	8	ASSIST.....	17	Hon. William W. Kenneth Moore, CM, LL.D, QC	
VALUE BILLING.....	9	SOLICITORS' SHORTS.....	18	JUDICIAL UPDATES.....	25
THE "UN-LAW" FIRM.....	10	CROSS-SECTION.....	20	A VIEW FROM THE BENCH.....	26
FUTURES FOR YOUNG LAWYERS.....	11	STUDENT PERSPECTIVE.....	21	CLASSIFIED ET CETERA.....	27

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PRESIDENT'S REPORT

By Wayne Barkauskas



Our province has largely been treated to the arrival of an early spring, and in this season of renewal, it is appropriate that work on the renewal of the Canadian Bar Association is moving full steam ahead.

The CBA Re-Think Initiative took center stage at the recent Mid-Winter Meeting of Council in Ottawa in February. The new CBA Strategic Direction was presented by Re-Think Steering Committee Chair (and CBA Alberta Past President)

Steven Mandziuk, QC, and passed with overwhelming support from the National Council. At the beginning of April, this Strategic Direction document was brought to the Alberta Branch in a special meeting of Council where it was presented alongside two proposed governance models. In mid-April, the CBA National Board established a Governance Transition Task Force, which will finalize the new CBA governance model for approval by the Board, and then by National Council at the August meeting of Council in Ottawa. We are looking forward to starting the 2016-17 year by sharing this information with Alberta Branch members.

Tied to the Re-Think Initiative was also a rebrand of the CBA's marketing activities. Members may have already noticed the "new look" on the national CBA website, as well as the websites for the British Columbia and Ontario Branches. The Alberta Branch website is next in line for a rebrand, and final touches are currently underway. The new website has many new and exciting features, including "MyCBA", which provides a space for members to customize how they interact with the CBA. Members can expect to see the new CBA Alberta Branch website live by the end of the spring.

The ability to advocate on behalf of the legal profession has been one of the priorities of our organization throughout the life of the CBA, and will continue to be after the completion of the Re-Think Initiative. The CBA has been involved in a number of advocacy efforts already this year, both at the national and provincial levels. Nationally, the CBA intervened at the Supreme Court of Canada on Information and Privacy Commissioner of Alberta v. University of Calgary to address fundamental issues related to solicitor/client privilege. The CBA pro bono counsel in this case included Alberta Branch Past Presidents Jim Lebo, QC and Michele Hollins, QC, and Alberta Branch member Jason Wilkins.

Provincially, the Alberta Branch working group on traffic court reform was pleased to see some of their innovative suggestions related to streamlining and simplifying how minor offences are enforced built into the recently introduced Bill 9, *An Act to Modernize Enforcement of Provincial Offences*. My hat goes off to the members of this working group (Marian De Souza, QC, Michael Bates, Chad Conrad, Marlo MacGregor and Alan Pearse) and the Agenda for Justice and Advocacy Committee, which regularly provides comments on issues affecting the justice system in our province.

In April, we celebrated the 34th annual Law Day with activities in Calgary, Edmonton, Medicine Hat, Lethbridge, Slave Lake and St. Paul (activities in Fort McMurray will be forthcoming at the end of May). As organizations such as Legal Aid Alberta and others who provide free or discounted legal advice to the public are becoming overwhelmed with the need in our province, Law Day remains an important event in the CBA calendar for providing access to justice. In addition to providing access to local courthouses, many Law Day events in the province also provide free legal consultations through "Ask a Lawyer" or similar events. This year also marked the fourth annual Dial-a-Lawyer event, which was held in conjunction with Law Day on April 16. Early feedback from the event indicates that the number of calls we received this year more than doubled from 2015. I want to personally thank all of the volunteers who gave their time to make these events a success, Legal Aid Alberta, who provided us with the space, technology, and expertise to run Dial-a-Lawyer again this year, and all of our other community partners.

We have been proud to introduce some first-rate professional development to our members over the first part of 2016. In January, we released the Legal Media Relations video series, the aim of which is to help bridge the divide that sometimes exists between the legal profession and the media. We are pleased to say that we have received enthusiastic feedback from the CBA National office, and this program has been accredited in other jurisdictions. If you have not already done so, you can view the "trailer" for this series and register on the CBA Alberta website at www.cba-alberta.org.

Coming up at the end of May is a new entry into our Savvy Lawyers Series of webinars called "Effective Advocacy Through Opening the Closed Mind". This webinar will feature insights into the science behind opening minds, practical suggestions on how to open the closed mind to persuasion and real examples from seasoned Alberta practitioners. We welcome panelists Glen Hickerson of Wilson Laycraft (author of *The Science of Opening the Closed Mind*), Patrick Fitzpatrick of Burstall Winger Zammitt LLP and Tim Foster of Foster Iovinelli Beyak to present on this fascinating topic. More information for this webinar is also available at www.cba-alberta.org.

Last, but certainly not least, I want to extend my congratulations to Ola Malik, who was acclaimed as the incoming Secretary for 2016-17 for the CBA Alberta. Ola has long been an active member of the CBA Alberta, with some of his past roles in the branch including Chair of the Municipal Law Section, Chair and Co-Chair of the Access to Justice Committee, regular contributor to Law Matters through the "Unsung Hero" column (read his latest entry on page 8), and enthusiastic member of the Editorial Committee. Please join me in congratulating Ola on his new position. The 2016-17 CBA Alberta Executive Committee will consist of Maureen Armitage as Executive Director, myself as Past President, Ola Malik as Secretary, Frank Friesacher as Treasurer, Jenny McMordie as Vice-President and Jeremiah Kowalchuk as Branch President. 🇨🇦

Ola Malik
of
The City of Calgary
has been acclaimed
Secretary of the Executive
of the Canadian Bar Association
Alberta Branch
for 2016 - 2017



WHAT'S HAPPENING

May

17: The Canadian Bar Association presents Raising Capital: Private Placements and Public Offerings. Webinar. To register visit www.cbapd.org.

19: The Canadian Bar Association presents the 2016 Competition Law Spring Conference. Toronto Region Board of Trade, Toronto, ON. To register, visit www.cbapd.org.

21: The Alberta Lawyers' Assistance Society presents AssistFit: Pilates and Core Strengthening. Lagree YYC, Calgary. To register email Heather Patrao at communications@lawyersassist.ca.

26: The Canadian Bar Association presents Drafting a Commercial Lease Agreement. Webinar. To register visit www.cbapd.org.

26: The Canadian Bar Association Alberta Branch presents Effective Advocacy Through Opening the Closed Mind. Live Webinar. To register visit www.cba-alberta.org, or call 403-263-3707.

29-June 3: The Canadian Bar Association presents the 2016 National Charity Law Symposium. Queen's Landing Hotel, Niagara-on-the-Lake, ON. To register visit www.cbapd.org.

30: The Ontario Bar Association presents Annual Update on Human Rights. Online. To register visit www.cbapd.org.

31: The Ontario Bar Association presents Navigating Family Law Issues in Schools. Live webinar. To register visit www.cbapd.org.

31: The Canadian Bar Association presents Cross-Border Deals: US and Europe. Webinar. To register visit www.cbapd.org.

June

2: The Great Bar Band Battle Society presents The Great Bar Band Battle in support of Calgary Legal Guidance. Flames Central, Calgary, AB. Purchase tickets online at www.barbandbattle.com.

2: The Canadian Bar Association British Columbia Branch presents Freedom of Information and Privacy Law Professional Development Conference. Telus Garden, Vancouver, BC. To register visit www.cbapd.org.

2: The Canadian Bar Association presents the 2016 Military Law Conference. Dow's Lake Court Conference Centre, Ottawa, ON. To register visit www.cbapd.org.

2: The Canadian Bar Association presents Dealing with Difficult Clients: Practical Advice and Solutions. Live webinar. To register visit www.cbapd.org.

21: The Alberta Lawyers' Assistance Society presents AssistFit: Glenbow Museum. Glenbow Museum, Calgary. To register email Heather Patrao at communications@lawyersassist.ca.

2-3: The Canadian Bar Association presents the CBA Environmental, Energy & Resources Law Summit. St. John's Convention Centre, St. John's, NL. To register visit www.cbapd.org.

7: The Ontario Bar Association presents Joint Sessions and Opening Statements in the Mediation of Civil Disputes. Live webinar. To register visit www.cbapd.org.

9: The Ontario Bar Association presents Intellectual Property and the Internet. Live webinar. To register visit www.cbapd.org.

14: The Canadian Bar Association presents Corporate Governance: The Role of Directors. Webinar. To register visit www.cbapd.org.

16: The Canadian Bar Association presents Getting Paid: Effective Billing and Free Collection Strategies. Live webinar. To register visit www.cbapd.org.

18: The Alberta Lawyers' Assistance Society presents AssistFit: Pilates and Core Strengthening. Lagree YYC, Calgary. To register email Heather Patrao at communications@lawyersassist.ca.

22: The Calgary Bar Association presents the 2016 Q.C. Dinner. Westin Hotel, Calgary, AB. For tickets contact Sarah Anderson at 403-298-4461 or qcddinner2016@bennettjones.com.

23: The Canadian Bar Association presents Drafting an Employment Agreement. Webinar. To register visit www.cbapd.org.

28: The Canadian Bar Association presents Regulatory Issues: Competition and Anti-Corruption Compliance. Webinar. To register visit www.cbapd.org.

July

23: The Alberta Lawyers' Assistance Society presents AssistFit: Spin. YYC Cycle Marda Loop, Calgary. To register email Heather Patrao at communications@lawyersassist.ca.

August

12-14: The Canadian Bar Association presents the 2016 CBA Legal Conference. Westin Hotel, Ottawa, ON. To register, visit www.cbalegalconference.org.

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.



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9 Emerging Truths About Legal Service Delivery

By Jordan Furlong

The market for legal services in Canada is changing, in ways that not every lawyer will like and that no one in the legal profession can control.

Global shifts in legal service regulation, the rise of new competition for our clients' business, and extraordinary advances in technology are all placing enormous pressure on lawyers. What's more, this unprecedented and potent combination of forces is taking place in the shadow of great economic turmoil and growing public impatience with our access to justice failures. If you've ever wondered what a "perfect storm" of change might look like in the law, this is it.

It's time for lawyers to look past the narrow confines of "the legal profession" and to see the larger, multi-faceted "legal market" of needs and opportunities. And it's time we fully understood some crystallizing truths about legal service delivery in this new market. Here are nine for your consideration.

- 1. Lawyers will no longer be the sole providers of legal services.** Para-professionals, accounting firms, legal document websites, and advanced legal technologies will each take a growing share of the legal market in the coming years. No law society can stop this, and some are already amending their rules to adapt to it. You can hate it and you can fight it if you like, but our monopoly is effectively over and it's not coming back.
- 2. Lawyers will ultimately benefit from a multi-provider market.** In truth, we have been punching below our weight for some time now, devoting our immense talents to tasks that are essentially clerical, transactional or procedural in nature. Others will take that work from us – and in the long run, we'll thank them, because we will be freed to apply our highest and deepest skills to more important and valuable needs and opportunities.
- 3. Lawyers will not become extinct in my lifetime or yours.** Paralegals, accountants, and legal technology developers all agree that they are complements to, not replacements for, lawyers. The legal market needs the expertise, ethics, and humanity that the legal profession provides. So long as we are prepared and qualified to deploy those features in service of client needs and public interests, consistently, then our future is assured.
- 4. Lawyers will learn to collaborate more than compete.** If we try to stifle competitors and innovations from outside the profession, we will be seen as eliminating client choice to protect our turf, and we will suffer accordingly. The lawyers who survive and succeed will be those who work alongside, not against, complementary performers and powerful machines – and ultimately, who collaborate with other lawyers in the service of client value.
- 5. Lawyers will learn to value and promote the client experience.** The key to meaningful reform of legal service delivery lies in improving the experience of legal service

buyers. New market players have shown us the way, by prioritizing accessibility, affordability, convenience, and ease of use in their product design and service delivery. Lawyers and law firms who follow suit will thrive. Those who do not will eventually disappear.

- 6. Lawyers will start to care about access to justice.** Actually, many lawyers do care about access, deeply. But the legal profession, as a whole, does not. Multiple studies in different countries show lawyers serve only about 15% of all legal needs and opportunities and block anyone else from meeting the rest. We will begin to address that by allowing new legal service providers into the market to meet those needs. We will completely address it when we start serving these needs ourselves.
- 7. Lawyers will become efficient and effective businesspeople.** A competitive market will force down lawyers' fees, requiring lawyers to reduce our costs of doing business. We will be obliged to streamline and improve our internal processes, which will allow us both to enhance the quality of our work and to offer predictable or fixed prices to our clients in the confident knowledge that we will ultimately turn a profit. We will come to see how law is both a profession and a business.
- 8. Lawyers will not reach this promised land quickly or easily.** There's a lot of turmoil and pain for the legal profession ahead, and there's no point denying it. Market upheaval is hardest on the incumbents, and harder still when the incumbents are risk-averse, resistant to change, and poorly trained in business fundamentals. Look for more new lawyers without jobs, more senior lawyers without successors, and more law firms to shrink or even shut down.
- 9. Lawyers will ultimately be better positioned than ever before.** As perfect a storm as this might prove to be, it is also true that every storm eventually gives way to sunshine. Whatever befalls individual lawyers, the legal profession will emerge from this process stronger and more formidable than ever. We will have higher skills, better processes, newer offerings, and a keener ability to identify and deliver value to our clients. That's the reward awaiting those who can make the transition.

Legal service delivery is shifting from a reactive, inefficient, single-channel routine to a dynamic, client-centric, multi-provider opportunity. Better tools are emerging, healthy competition is flourishing, and a larger, deeper and more lucrative market is waiting, poised to exploit and enjoy a cavalcade of new options. Lawyers can and should be first in line to meet those needs and fulfill those opportunities. The way forward is becoming clear. It only remains for us to take it. 🇨🇦



Jordan Furlong is an Ottawa-based legal market analyst and consultant with Edge International who has addressed dozens of audiences worldwide on the new legal market. He writes at law21.ca.

Aspiring to the Highest Standards of Civility

With thanks to the Honorable Chief Justice Neil C. Wittmann

The Honorable Chief Justice Wittmann recently spoke to members of the Bench and Bar at an Advocates Society reception in Calgary about the importance of civility in our profession. We thought his words were worth repeating. The following is an excerpt from his speech:

Everyone has witnessed uncivil conduct in the course of litigation. The Advocates' Society has led the way in defining the obligations of the profession. Nevertheless, the focus on civility regulation has increased in the past decade. Why? I suggest it is because we are not talking only about bad behaviour, like rudeness and insult, although that is probably on the rise too. What we need to talk about is behaviour that undermines our professional obligations as advocates and officers of the court.

In the Alberta Law Society's Professional Code of Conduct, Rule 4.01(6) requires lawyers to be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings. The Commentary to the rule warns that a "consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct." Although legal contempt of court and the professional obligation against misconduct are not identical, persistent incivility is viewed as misconduct.

The Law Society of Upper Canada exhorts lawyers using almost identical language¹ but its Commentary presents the carrot of civility, not the stick. For example, it says that lack of courtesy will impair the ability of lawyers to perform their function properly and is not in the client's or the public's interest. Animosity between lawyers may cause their judgment to be clouded by emotional factors and hinder the matter's proper resolution.

So how do we distinguish merely abrasive behaviour from ethical misconduct? We talk a lot about incivility and the need for reform. The majority of complaints that Law Societies receive are allegations of incivility. But the fact is, the actual number of discipline cases that are heard following complaints of incivility is very small. In 60 reported disciplinary decisions from 2009 for the law societies of British Columbia, Alberta, Saskatchewan, Manitoba and Nova Scotia, only one addressed incivility. And in all common law jurisdictions between 2007 and 2012, only ten did.² It may be that a consistent pattern of incivility is what attracts complaints, but that this pattern is a signal of something more serious.

Regulation of civility has its detractors. Critics say that if we don't distinguish obnoxiousness from actual misconduct, we risk punishing zealotry and imposing a chill on a lawyer's fearlessness in championing the client's cause. We may be better able to reconcile the competing values of lawyers' duties to clients and the obligation to be civil by examining the motives and effects of an alleged incivility instead of simply parsing the behaviour to see whether it meets a defined standard, a

By Maureen Killoran, QC and Anne Kirker, QC

standard which may be subjectively interpreted. At what point does forceful advocacy become incivility justifying discipline?

The most recent statement from the Bench on this issue is the *Groia v. The Law Society of Upper Canada* decision by the Divisional Court of Ontario in February of last year.³ Groia was defence counsel for John Felderhof, a Bre-X officer and director. Felderhof was charged with eight counts of violations of the *Securities Act*⁴ for insider trading and authorizing misleading news releases about Bre-X. Billions of dollars were lost by institutional and individual investors in this spectacular fraud. It was the biggest in mining history, in which news of a large gold find had been completely manufactured. Felderhof was the only one ever charged.⁵

The Divisional Court set out a two-part test for determining what constitutes incivility that invites sanction for professional misconduct. The analysis begins with a concern that the conduct is rude, unnecessarily abrasive, sarcastic, demeaning, or abusive. It is conduct that attacks the personal integrity of opponents, parties, witnesses or the court and that has no good faith basis. If there is a good faith basis for the belief that led to the attack, the belief is not an objectively reasonable one. This aspect of the test effectively captures the conduct of a legal professional who may be suffering from a mental health problem.

The second part of the test addresses the necessity for an additional element attached to the uncivil conduct for it to rise to the level of professional misconduct. The Court said:

"It is conduct that calls into question the integrity of the court process and of the players involved in it. It is conduct that risks bringing the administration of justice into disrepute because it is conduct that strikes at the very qualities of what the justice system represents.. It is the difference between impassioned, but reasoned, disagreements and the uninformed, nasty, personal tirades that too often mark the exchanges we see in political and media exchanges on matters of public importance." [at para. 75]

There is another aspect to an assessment of uncivil conduct which was not articulated by the Divisional Court. Should we be looking at the kind of matter being litigated, and what is at stake, in making that assessment? Should a criminal matter, where the liberty of the accused hangs in the balance, be assessed by the same standard of conduct?

In *Felderhof*, the Ontario Securities Commission prosecutor was reprimanded more than once by the trial judge for an approach described as aggressive.

Jay Naster was rebuked by the presiding judge for sarcastic comments. He was also reprimanded for his aggressive cross-examination of the junior lawyer who swore the supporting affidavit listing correspondence about the Ontario Securities Commission's failure to produce relevant documents.

¹ Rule 7.2-1: A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

² Alice Woolley, "Uncivil by too much civility? Critiquing Five More Years of Civility Regulation in Canada", December 8, 2012, Dalhousie Law Journal (forthcoming). Available at: <http://ssrn.com/abstract=2186930>

³ *Court of Queen's Bench of Alberta Notice to the Profession* (23 December 2015), online: Alberta Courts <<https://www.albertacourts.ca/court-of-queens-bench>>.

⁴ R.S.O. 1990 c S.5

⁵ R v. Felderhof 2002 CALII 41888 (Ont SC)

BARRISTERS' BRIEFS

Naster suggested that the court's rulings were "presumptively wrong and unfair", and sought, unsuccessfully, to have presiding judge Justice Peter Hyrn removed for alleged bias against the prosecution. He accused Groia of telling "bald-faced lies" and as being like "someone who drops a bomb and runs". This was clearly a demanding case for defence counsel, and one in which a lot was at stake for the accused.

Felderhof was acquitted. As for Groia, the Law Society Appeal panel reduced the original penalty imposed on him to costs of \$200,000 and a one-month suspension. The Divisional Court dismissed Groia's appeal against the Appeal Panel decision, and we are now waiting for the Court of Appeal's decision. One of the arguments being made by the lawyers acting for Groia at the Court of Appeal is that his conduct did not meet the Divisional Court test.

Another complicating factor that we encounter with the Groia test has to do with the assessment of what is reasonable. The reputation of the administration of justice is of paramount importance. The public's respect for the justice system rests in large part on its faith that the process remains fair and reasonable. But what is reasonable to the legal profession may not appear so to the average citizen. So I would add to the test that the impugned conduct must not just risk bringing the administration of justice into disrepute, but must undermine or have a realistic prospect of undermining the administration of justice.

...

I'd like to touch on the extent of judicial responsibility to both engage in civil conduct and to enforce it. Judges define the culture in a courtroom and have a positive duty to control proceedings. But there are differences of opinion about how far a judge can go when faced with conduct by a lawyer that is rude, demeaning or abusive. ...

...

Without answering [this question] here, I think the assessment of an experienced trial judge is at the very least a reliable evaluator of conduct that merits intervention. In my experience, different situations call for different levels of supervision. A judge would be more likely to intervene if an attack is an uninformed personal tirade based on expectations that are unreasonable or unrelated to the process, or made in bad faith. As Justice Nordheimer said, the concern over the chill on zealous advocacy loses much of its impact if the advocacy is being used to further arguments where the facts would not reasonably warrant the relief sought.⁶


...

It is hard to overemphasize the importance of preparation and of co-operation between counsel. The bully, the ill-prepared, and the rude build their own reputations. Once you get a bad one, it is around the Court as quickly as lightning, and may be very difficult to change.

Justice Michael Code has summarized the elements of competing interests that need to be balanced between the profession's duties to clients and public interest duties to the court.⁷ On behalf of the client, you must avoid conflicts of interest,

protect solicitor and client privilege, and protect the client's best interests by fearlessly pursuing every issue that can legitimately be raised. You would also do well to take on only those cases that are within your area of skill and training.

These should be balanced with duties not to mislead the Court, not to distort the truth, not to unduly delay or frustrate court proceedings. Lastly, you cannot go wrong if you refrain from making unfounded or irrelevant personal attacks on your opponent, and show respect and courtesy towards all participants in the justice system.

The call for civil conduct in our profession is rooted in the long human history of dispute adjudication. We have evolved, I hope, from a place where the winner was the one with the biggest stick, to the loudest bully in the village, to trial by fire, to where we are today: the use of persuasion through reason. Let us be wary of reverting to old ways. 



Maureen Killoran QC, is the Managing Partner and Partner in the Litigation Group of Osler, Hoskin and Harcourt LLP in Calgary, a Canadian Bar Association Partner Firm. Maureen has been contributing to the "Practice Pointers" column since 2008.



Anne Kirker, QC is a partner with Norton Rose Fulbright in Calgary, a Canadian Bar Association Partner Firm. She was recently named as the Best Lawyers Lawyer of the Year in the area of Legal Malpractice.



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⁶ Groia v. The Law Society of Upper Canada, 2015 ONSC 686, at para 64.

⁷ Code, Michael "Counsel's Duty of civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim L. Rev. 97.

Darryl Aarbo, Q.C.

By Ola Malik

We are delighted to introduce you to Darryl Aarbo, Q.C.

When you ask lawyers why they've committed to advancing social causes or advocating for others, you'll often be told that "it's just the right thing to do". Lawyers are particularly adept at seeing where the inequities lie and have the skills to redress them. For some, helping others is important matter of principle. For others, it's deeply personal.

Having graduated with his law degree from Queen's University and being called to the Ontario bar, Darryl returned to Calgary and, in 1998, joined Gary Courtney and Sandra Sebree's law firm, Courtney Sebree. At the time, there were few openly gay practicing lawyers and no law firms that were catering to the gay and lesbian community. If you were gay, you would have been hard pressed to find a lawyer that understood your problems and made you feel comfortable. But increasing numbers of people were living in same sex relationships and wanted the same protections and benefits as everyone else. Same sex partners needed a lawyer who could draft their wills, purchase jointly owned property, figure out how to deal with a spousal support claim after a relationship breakup, determine benefits to be paid when one of the partners died, and whether they could adopt children.

Gary and Sandra had a simple yet powerful vision -- to provide a small firm general practice for anyone walking through the door but with a particular focus on providing services for the LGBTQ community. And that's exactly what they did. Darryl, Gary and Sandra were involved in fundraising and building community support for Delwin Vriend who was at the centre of the landmark Supreme Court of Canada case which held that the exclusion of sexual orientation as a ground of discrimination in Alberta's *Individual Right's Protection Act* created a distinction that resulted in the denial of equal benefit and protection of the law on the basis of sexual orientation. The firm was also lead counsel in Alberta's first case which established that same-sex couples have the right to adopt their same sex partner's biological children.



Darryl Aarbo, Q.C.

Along the way, Gary retired from practice and Darryl became partner of the firm which is now called Courtney Aarbo Fuldauer LLP. The firm is still a strong supporter of LGBTQ and other important causes such as Pride Calgary, Fairytales Film Festival, AIDS Calgary, Calgary Men's Chorus, Third Street Theatre, the Apollo/Western Cup and the Chinook Foundation. Over the years, the firm's lawyers have provided countless hours of outreach services and legal information through various legal clinics. The firm provides discount legal services through Employee Assistance Programs, encourages its lawyers to take Legal Aid files, and provides legal services for discounted fees.

The firm's strong commitment to making a difference should come as no surprise given Darryl's own contributions. He has volunteered with Calgary Legal Guidance, is an active swimmer and serves on the board of the Different Strokes Masters Swim Club (a swim club directed towards the LGBTQ community), served on the board of Outlinks (which provides outreach services to the LGBTQ community), served on the board of Fairytales Presentation Society (which hosts a film festival and provides outreach to the LGBTQ community in smaller centers), chaired (and is still involved in) Alberta CBA's Sexual Orientation and Gender Identity section (south), volunteered with the Sharpe Foundation (which provides services to AIDS patients in hospices), and financially supports the Children's Legal Education Centre in Calgary. If you ski, you might even see him at the Mt. Norquay ski resort where he now a full member of the Canadian Ski Patrol!!!

This feature titled "Unsung Hero" 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.

Darryl's contributions haven't gone unnoticed. In 2016, he was awarded the Q.C. designation and we'll see him get roasted (hopefully) at our next Q.C. Dinner here in Calgary.

Darryl, Gary and Sandra are Unsung Heroes -- they made a commitment to support their community at a time when there was far less acceptance of the LGBTQ community than there is now -- they represent some of the finest qualities of our profession and they do us proud. 🍷

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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 newslet@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.

Value Billing: Why Does Pricing Matter?

By Timothy Burnham

Books have been written about the concept of pricing professional services based on value as opposed to an hourly rate. In fact, two very good sources are "Pricing on Purpose" and "Implementing Value Pricing: A Radical Business Model for Professional Firms", both written by Ronald Baker. I strongly encourage anyone interested in learning more about this topic to read these tomes.

The purpose of this article is not to say what is or what should be, but to talk about what could be. To provoke thought. To cause you to think about your firm as a business, and in particular, to consider how we can price legal services and why it matters to us as lawyers, to our clients and to society in general.

The public has a perception of lawyers and our fees. In general, the public feels that lawyers charge too much and people cannot afford to hire them. This, in turn, causes us to be seen as a barrier to "Access to Justice". Is this perception accurate? Legal fees in many areas have not kept pace with inflation, profitability for law firms has gone down and lawyers spend countless hours volunteering and providing pro bono services throughout the province. Why is there a disconnect between the public's perception and lawyers' experiences?

Perhaps part of the answer is in the concept that we as lawyers are not adding more in value to our clients than the price they are paying. Or put another way, perhaps we are not adequately explaining the value of the services we are providing the public.

Why does pricing matter? Pricing is a key underlying component of how we interact with clients. Pricing is a key indicator to our clients of the quality of the legal services being provided. Pricing is a key driver of client satisfaction. Pricing is the key driver of firm revenues.

"A business is defined by that for which it collects revenue. You are what you charge for. A company's price is the only opportunity it has to capture the value it creates for the customers it serves. Of the four Ps of marketing, price speaks the loudest, and dwarfs the others since it is the objective value it places upon its value proposition, which in the final analysis will be subjectively valued by the customers it is privileged to serve." (Ronald Baker)

The traditional model of pricing legal services using an hourly rate is, in economic terms, a cost-plus pricing system. This cost-plus pricing system has some significant drawbacks in today's business world and the current economy. It is focused on lawyer's inputs and costs. The problem is clients don't care about firm overhead or if lawyers are making enough money. It is not up to the clients to provide the firm a profit. It also introduces uncertainty for clients. It confuses cause and effect. High labour costs do not necessarily mean high value for the client. Also, when you reward billable hours you get more billable hours, even if they add little value to the client.

The billable hour model has also had some recent judicial

criticism.


"A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features." (*Bank of Nova Scotia v. Diemer*, [2014] ONCA 851, per Justice Peppal)

Fortunately, according to Ronald Baker, a better theory has been put forward, known as the Subjective Theory of Value. That theory holds that, ultimately, it is the person paying for an item, not the seller's internal overhead, desired profit, or labour hours, which determines the value of anything. This then is the crux of the concept of value billing. "You will not be profitable simply because you raise your prices. You can only raise your prices if you offer a value proposition worth more to the customer than the cash they are parting with." (Ronald Baker).

This theory suggests that sometimes the price we charge exceeds the value perceived by our clients, and then we have unsatisfied clients. However, sometimes the price we charge falls far below that which the client would be willing to pay based on the value they have received in return. In those cases, the lawyers have lost the opportunity to be truly compensated for the value they have added to their clients, and this in turn decreases firm profitability.

This pricing approach does entail some risk. What if we don't charge enough? What if it takes longer than we expect? The problem with this line of reasoning is that it ignores where profits come from in the first place. Where do profits come from?

"The real answer is risk...In the final analysis, a business cannot eliminate risk, as that would eliminate profits. The goal is to take calculated risks and choose them wisely. The problem in many firms is that they are operating in order not to lose, rather than to win. By setting a nice comfortable floor on their earnings (via the cost-plus pricing mechanism), they have placed an artificial ceiling over their heads as well. This is self-imposed, and it comes from the attempt to avoid risk and uncertainty." (Ronald Baker).

By understanding the value of the services we provide to our clients, and educating them about the same, we can begin to implement billing based on the value of the work we perform, as opposed to the time we spend. This in turn has the potential to increase access to justice, improve public perception, client satisfaction and firm profitability. 



Timothy J. Burnham is a partner at the Gurevitch Burnham law office in Grande Prairie. Tim is a registered family mediator, and is the current instructor for the Parenting After Separation seminars in Grande Prairie and Peace River.

Cognition to Axiom: The Development of the Un-Law Firm

By Robert G. Harvie, QC

"Uber." The next big thing is always "The Uber of..."

So it's no shock that at last summer's CBA National Conference guest speaker Leonard Brody made the assertion that there was, as he spoke, an "Uber" development for lawyers that we would be foolish not to see coming.

And it's no shock that more and more we're seeing blogs and articles talking about the development of "Uber Law Firms" working to take away business from those who are mired in the 19th century model of legal service delivery.

And, yet, most lawyers nod and go back to their desk feeling somewhat comfortable in doing things, "the way we've always done it."

Meanwhile, however, real people, in the real world, were working for actual clients in ways that weren't "the same old, same old." In 2005, Rubson Ho started up a new, lean and aggressive legal service firm called "Cognition LLP". Cognition LLP quickly developed a strong base of highly skilled and highly experienced corporate counsel, taking their members from some significant lawyers in the "Big Law" field and from in-house corporate counsel as well, including senior counsel with former lives at firms like Gowlings, Oslers and Stikemans and corporate entities such as ExxonMobil and CNRL.

The model of this new upstart was a lean delivery process that eschewed the in-house dining service and massive board rooms, with lawyers most often working at home or at client offices, taking full advantage of cloud-based computers and other technology reducing the reliance upon the traditional big-firm "brick and mortar". When lawyers are "in the office", they are in shared office facilities. The result reportedly being that legal costs to clients are reduced from a half to a third of comparable traditional legal service providers.

And then, as even that change began to ripple the waters of the legal sphere in Canada, offshore came, perhaps, a tsunami. A U.S. corporation coming into Canada to provide legal service to Canadian corporate clients.

Meet Axiom. Or, to be precise, "Axiom Global Inc."

In January of 2016, Cognition's large "corporate clientele with general counsel" base was taken over by Axiom - with the small/medium enterprise corporate work moved to newly formed "Caravel Law".

"Caravel Law" appears to continue to serve clients as a law firm, but as with Cognition, focused on developing lean, efficient service models that "cut the fat" of Big Law and deliver high quality service in a more efficient (read "less expensive") and personalized manner.

But Axiom is a whole different animal, and it's feeding in our own backyard as of January 2016.

Who, or more importantly, what is Axiom?

Well. If you go to their website, www.axiomlaw.com, it looks sort of like Cognition. Lawyers without ties, sitting around nondescript tables, with large, airy staff areas where people collaborate to find solutions to their clients' legal problems. It looks like a "Google-ized" law firm.

But here's the rub. It's not a law firm at all. Which means no Law Society oversight. No restrictions on advertising, no regulatory compliance costs. No "responsible lawyer" to attend to the coming "entity regulation" programs. Basically, it's the Un-Law Firm.

If you dig through their website they looks like a large law firm delivery package, but then you find your way to these interesting disclaimers:

Axiom® is not a law firm and does not provide legal representation or advice to clients. Axiom attorneys are independent and do not constitute a law firm among themselves. The Axiom mark is the property of Axiom Global, Inc. and is intended solely for the purpose of marketing Axiom services, and not for the practice of law.

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So. We know what they aren't. They are not a law firm. They do not create attorney-client privilege, and the service the company provides are not protected by oversight of a legal regulatory body, like the Law Society of Alberta. The individual lawyers are, but not the corporation as a whole.

Well. Clients won't buy that. The foundation of public trust in our profession rests in the oversight and regulatory authority of our Law Societies, doesn't it? Maybe not.

According to Forbes magazine, Axiom recently signed a \$73 million contract to review collateral risk to a major worldwide bank.¹ In a recent Beaton Capital online article, they predicted that by 2018 Axiom may well be the world's largest legal services firm.²

You see, since Axiom started out in 2000, it has grown to become a massive legal service provider where they seem to broker or organize solutions for clients who have need for assistance in

¹ <http://www.forbes.com/sites/danielfisher/2015/02/12/legal-services-firms-73-million-deal-strips-the-mystery-from-derivatives-trading/#677878041947>

² <http://www.beatoncapital.com/2013/09/2018-year-axiom-becomes-worlds-largest-legal-services-firm/>

All About “Do Law Differently”



Law students and young lawyers today are entering a profession that is much changed from when their grandparents or even their parents might have entered. Technological advances, globalization, an uncertain economic climate, increasing gaps in access to justice and changing client demands are collectively forcing legal practitioners to learn new skills in order to succeed.

Part of the CBA Legal Futures Initiative work has been to prepare the profession to best meet the challenges this new reality presents.

The Futures Initiative asked Jordan Furlong, a leading thinker in the field, to develop a guide for law students and young lawyers to help them to navigate a rocky and sometimes uncertain path and make the most of the opportunities that lie ahead. The guide, titled *Do Law Differently: Futures for Young Lawyers* (<http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>), sets out the situation as it exists, talks about some of the things new lawyers will need to know that they won't have learned in law school, and lays open the range of possibilities available to lawyers - in new ways of practising law and in new business models for reaching

the public. It also offers resources for law students and young lawyers to learn more on all of these topics.

Of particular interest are the interviews with 26 #newlaw pioneers, people who've walked the walk, talking about the rewards of doing law differently.

The guide, available exclusively to members, was launched at the CBA MidWinter Council meeting. At the same time, we created a closed Facebook group to bring law students and young lawyers together to discuss what's going on in their legal worlds, identify problems and contemplate solutions.

Do Law Differently is a living document that will evolve with its audience. We're already starting to plan a second edition which will build on the first guide using information we've gathered from law students and young lawyers themselves about what they need to know - and what they've learned.

Do Law Differently - it's both a suggestion and a necessity. The guide will help show you how.

continued from p.10

matters relating to their legal concerns:

Axiom functions more as a consulting company than a law firm or temp firm. It conducts audits of the in-house legal department's needs, and then designs solutions to meet them. The solutions can include a customized team of lawyers with the expertise and price point needed by the general counsel. They can also include services provided by one of Axiom's four delivery centers, which are staffed by attorneys, paralegals, negotiators, and other non-attorney staff. The delivery centers perform services including document review, discovery, and mergers and acquisition negotiation. Axiom's marketing focuses on performing legal work efficiently through this segmentation of legal services.³

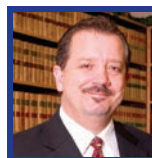
The fact that Axiom is not governed or subject to the oversight of legal regulators doesn't seem to faze a growing and sophisticated clientele.

³ <http://www.ocbar.org/Portals/0/pdf/education/2012/solo/Article.46.LessCostMoreValue.pdf>

Which raises all sorts of interesting questions regarding our perspective on what it is that our clients' want and need from lawyers and lawyer regulators. Maybe it isn't what lawyers and law societies think it is.

If we've learned anything from Uber, perhaps, it's that if you provide reasonable service at a lower price, clients will ignore the absence of regulation and insurance.

As our Federation of Law Societies work towards increasing regulatory oversight and "entity" regulation, they may be setting the groundwork for their own eventual irrelevance. The "new" development of entity regulation may already be passé. Time will tell.



Robert G. Harvie, Q.C., is the Chair of the CBA Alberta Editorial Committee and Editor of *Law Matters*. 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.

Sexual Orientation & Gender Identity Conference

By Lorne J. Graburn & Frank Durnford

The Sexual Orientation and Gender Identity Conference (SOGIC) exists to represent lesbian, gay, bisexual, transgendered, queer, questioning, two-spirited (LGBTQ) and allied members of the CBA. SOGIC provides a forum for the exchange of information and ideas, and the facilitation of action on legal issues, including those related to sexual orientation, gender identity, and gender expression.

It has been a busy time for SOGIC nationally and in Alberta. We are grateful to our partners who have helped us fulfil the education and advocacy functions of our mandate. SOGIC's Alberta Branch kicked off this year with an inspiring presentation by the Honourable Mr. Justice M.D. Gates of the Court of Queen's Bench of Alberta. In his address on celebrating ten years of marriage equality in Canada, Justice Gates compared the paths to same-sex marriage in Canada and the United States, and ably explained the Supreme Court of the United States' decision in *Obergefell v Hodges*, (2015) 135 S Ct 2584, which legalized same-sex marriage. SOGIC's Alberta Branch co-hosted the presentation with the Pride Network at McCarthy Tétrault LLP's Calgary office. The McCarthy Tétrault LLP Pride Network has been partnering with SOGIC's Alberta Branch annually to host presentations on LGBTQ-related issues and diversity since 2013.

At the national level, upon SOGIC's proposal, the CBA applied for (and was granted) leave to intervene before the Nova Scotia Court of Appeal in *Trinity Western University v Nova Scotia Barristers' Society*: Docket CA 438894. This case concerns the Nova Scotia Barristers' Society's decision not to accredit Trinity Western University so long as its community covenant—which requires students (among others) to refrain from sexual intimacy outside of heterosexual marriage—is in place. Without a doubt this will be a watershed case for LGBTQ rights in Canada. We are very grateful for the tireless work of our SOGIC colleagues across the country, many of whom have worked on a pro bono basis, or have otherwise invested time and energy to ensure the CBA's participation in this critical appeal.

During the CBA's Mid-Winter Council Meeting in Ottawa, SOGIC sponsored the Protecting Gender Identity and Gender Expression Rights in Corrections and Detention resolution. Moved by SOGIC and seconded by the Military Law Section, the resolution recognizes that transgender, transsexual, non-binary, transitioned and two-spirit people in Canadian correctional or detention facilities are at significantly heightened risk of harassment, assault, sexual assault, suicide and even murder. Among other things, the resolution calls upon all levels of government to adopt comprehensive, nondiscriminatory corrections,

incarceration and detention policies to protect the rights and accommodate the needs of transgender, transsexual, non-binary, transitioned and two-spirit prisoners. The motion passed unanimously.

SOGIC's Alberta Branch similarly continues to advocate in favour of LGBTQ rights. SOGIC participated in the public consultation with the Government of Alberta when it placed on hold Bill 10: *An Act to Amend the Alberta Bill of Right to Protect Our Children*, 3rd Sess, 28th Legislature, Alberta, 2014. SOGIC called upon the Government of Alberta to add express legal protection for transgender Canadians in Alberta's human rights legislation, and to introduce anti-homophobic and anti-transphobic measures to the province's safe school practices and policies. SOGIC was pleased that the Government of Alberta added gender identity and gender expression to the prohibited grounds of discrimination in its human rights legislation via Bill 7: *Alberta Human Rights Amendment Act*, 2015, 1st Sess, 29th Legislature, Alberta, 2015.

SOGIC's Alberta Branch continues to offer programming that fosters awareness of LGBTQ issues relevant to the profession and the wider community, and provides a space for LGBTQ lawyers and their allies to network and socialize. Our meetings are open to all CBA members and we welcome you to join us any time. 🌐



Lorne J. Graburn is an associate with Dentons Canada LLP in Calgary. He practices in the areas of litigation and dispute resolution, employment, occupational health and safety, and fraud and asset recovery. Lorne is also the Chair of CBA Alberta's Sexual Orientation and Gender Identity Conference.



Frank Durnford is in-house Legal Counsel at Enbridge Inc. Frank is the national Vice-Chair of the CBA's Sexual Orientation and Gender Identity Conference and the founding Co-Chair of the Alberta section.

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Plans are well underway for this year's CBA Legal Conference, being held in Ottawa from August 12 - 14. Visit the website at www.cbalegalconference.org to see the speakers we've lined up, take a look at networking opportunities, and to get a taste of what you'll learn in the three PD streams (Building a Better Profession, Building a Better Practice and Building a Better Person).

ENTITY REGULATION

Many of the provincial law societies are currently deliberating on whether (and if so, how) to implement some form of entity regulation in their jurisdictions. The CBA Ethics and Professional Responsibility Committee, in consultation with the CCCA and other groups, provided its input to the Federation of Law Societies of Canada in February 2016.

Visit <http://bit.do/entityregulation> to watch the video of the presentation to Council at CBA Mid-Winter.

2016 IN-HOUSE COUNSEL COMPENSATION & CAREER SURVEY RESULTS

The Counsel Network and the Canadian Bar Association's (CBA) Canadian Corporate Counsel Association (CCCA) provided advance viewing of the findings of the 2016 In-House Counsel Compensation & Career Survey on April 5, 2016 at the CCCA National Conference in Calgary.

The full results are now available.

Conducted by Bramm Research, the survey shows the average salary for in-house counsel has increased, and more respondents say they have had no or a smaller salary increase in the past year than in 2012 when the last survey was released.

The results of the survey further indicate that female in-house counsel are earning 15% less than their male in-house counterparts. For in-house counsel, the gender wage gap is real and it is not shrinking.

View the entire survey online at <http://bit.do/compensationsurvey>

CBA RE-THINK - STRATEGIC DIRECTION

At the CBA Mid-Winter meeting in February, Council approved a new Strategic Direction for the CBA, which summarizes our aspirations, values and the foundation on which we'll build a better association, starting with this value proposition: "The CBA connects members to the people, knowledge and skills they need to successfully practise law in Canada."

The Strategic Direction marks an interim stage in the Re-Think process begun in 2014, when, faced with declining membership, particularly among young lawyers; the growth of competitors offering legal services for less; a blurring of professional boundaries; and the erosion of the rule of law, the CBA embarked on an exercise to find out what its constituency wants from the association. It wanted to know which of its offerings lawyers valued, and which they did not.

Read more online at <http://bit.do/CBArethink>

For more information on these and other national Canadian Bar Association initiatives and news, visit www.cba.org/Publications-Resources/CBA-News.

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**Arnold Shives (b1943),
Northern Lights, Nass Valley 1981**
Linocut on Paper, 37/40

Northern Lights, Nass Valley 1981
is also in the collections of the National Gallery of Canada, the Nickel Arts Museum, the Concordia University Contemporary Collection and the Art Gallery of Greater Victoria.

FRONT AND CENTRE

Law Day - Calgary



The cast of "Custody Battle on the Gridiron": (l to r) Chad Conrad, Ralph the Dog, Stamper Brandon Boudreau, Hon. Judge Todd LaRoche, Aaron Martens, Michele Hollins, QC



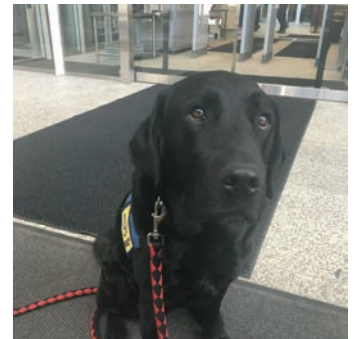
Stamper Brandon Boudreau and Ralph the Dog pose for photos with a family from Syria who had recently arrived in Calgary.



Over 50 members of Calgary's Chinese community toured the Courts Centre with the Calgary Chinese Community Service Association



Volunteer Brittanee Laverdure - just one of our amazing Law Day volunteers!



Calgary Police Service Victim Assistance Unit support dog Hawk

Law Day - Edmonton



Cinderella v. Lady Tremaine et al cast (back, l to r) Jordan Wray, Sarah Coderre, Hon. Judge R.R. Cochard, Stacey Grubb, Anna Choles (front, l to r) Megan Dawson, Stephanie Bachelet, Ian Hanson, Michelle Karasinski

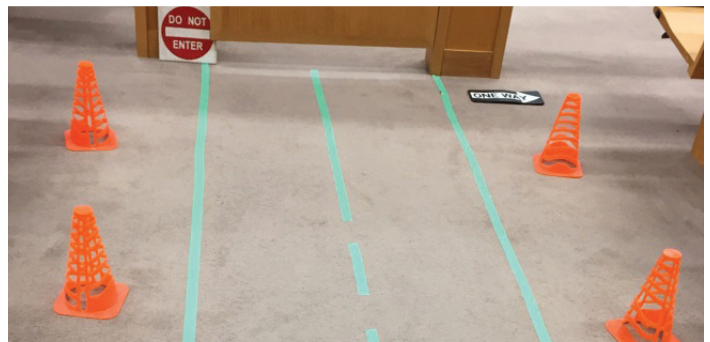


Luke Skywalker & Princess Leia v. Darth Vader cast (back) Hon. Justice Zalmanowitz, (front, l to r) Suzanne Dalton, Michelle Pidhirney, Tasneem Karbani, Ed Picard, Brandon Hans, Yoko Azumaya, Shelagh Secord

Law Day - St. Paul



Law Day St. Paul Co-Chair Renée Moore, Jerred Moore



One St. Paul courtroom was set up to look like a highway.

Law Day - Lethbridge



The Lethbridge Law Day event was Star Wars themed this year!



Citizenship Ceremony Dignitaries: CBA Alberta President Wayne Barkauskas, Citizenship Judge Joe Woodard, Lethbridge City Councillor Ryan Parker, Lethbridge MP Rachael Harder

FACL - Diversity in the City Gala



Diversity in the City Gala Co-Chairs Akash Bir and Jessie Gill (photo: James Lo)



(l to r) CBA Alberta Diversity Section Co-Chair and FACL West Director Daniel Lo, Mayor Naheed Nenshi, Steven Ngo (photo: James Lo)



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ALBERTA BRANCH NEWS

MEMBER SAVINGS PARTNER: PEAK SAFETY SERVICES



Peak Safety Services

Up to 85% of cardiac arrests happen outside of hospitals. Are you ready if one of these cardiac arrests happens in your workplace? CBA Alberta recently announced a partnership with Peak Safety Services to provide our members with discounts on the purchase of Automatic External Defibrillators. Through this partnership, members receive regular discounts of \$100 off the purchase of an AED unit.

In addition, through the end of May 31, we are participating in a group buy period. This allows us to place a bulk order, and pass on greater discounts to our members. During this period, the more members who purchase units, the greater discounts we will receive.

For more information on this program, visit www.cba-alberta.org

SAVVY LAWYERS SERIES - THE SCIENCE OF OPENING A CLOSED MIND

Friday, May 27, 2016 (12pm - 1:30pm)

Panelists: Glen Hickerson (Wilson Laycraft), Patrick Fitzpatrick (Burstall Winger Zammit), Tim Foster (Foster Iovinelli Beyak)

Advocating means holding up your client's situation to scrutiny by strangers. Those strangers, typically opponents and decision-makers, have never walked in your client's reality. Like the rest of us, their capacity for seeing things from another's perspective is imperfect. Their minds may be closed.

The art of opening a mind or encouraging a listener to reconsider an initial point of view draws on cognitive science. That science allows for insight into why the mind of an opponent or decision-maker may be closed to new ideas, and provides tools to open those minds and help you become a more effective and persuasive advocate.

Please join us on May 27 for a look at this fascinating topic, featuring insights into the science behind opening minds, practical suggestions on how to open the closed mind to persuasion, and real examples from seasoned Alberta practitioners.

Register online at: http://www.cbapd.org/details_en.aspx?id=AB_SKIL27516

COMMITTEE INTEREST FORMS

Committee interest forms are due on June 30, 2016. If you are interested in increasing your involvement in the CBA, committee work is a great place to start. Give back to the legal community through participation in committees such as Legislative Review & Law Reform, Access to Justice, Agenda for Justice & Advocacy, and Law Day. Or, contribute to the production of this very publication by joining the Editorial Committee.

Nomination forms will have been sent by email to all members in early March. If you have not received yours, you can access the forms online at www.cba-alberta.org. If you have any questions about committee participation, please contact Holly Schlaht at 403-218-4311.



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Please forward your cover letter and resume to Deirdre McKenna at Deirdre@dwlaw.pro or call (403) 328-1746 by June 1, 2016.

We appreciate the interest of all applicants, however only those selected for an interview will be contacted.

It Is What It Is

By Robert Hawkes, QC

It's no secret that being a lawyer is demanding. A lot of what we have to do in a day is inherently stressful. It may involve conflict. The stakes are often high and invariably important to our clients. We are usually working to a deadline. Routinely we work with incomplete or, worse, inaccurate information.

Add in who we are as lawyers and it gets worse. Getting into law school requires skills and abilities that are more often found in high achievers. Competitive, aggressive, goal-oriented and pressure driven. Many of us feel more comfortable when we're in control. The profession has a high percentage of type "A" personalities.

Put the job and the type together, and you have a recipe for stress. It seems inevitable, and to some degree it is. But life is rarely governed by absolutes. The question isn't whether the task is stressful, or whether you have character traits that predispose you to create stress for yourself. The question is: what do you do about it?

If you take nothing else from this article, take this: all stress is self-generated. All of it. Stress doesn't arise from what happens; rather we experience stress from how we perceive what happens or what we believe may happen. It is this narrative in our head that generates stress.

I've had a long life with many troubles, most of which never happened...

-- Mark Twain

Consider a simple example. Getting fired is often perceived as stressful, but if you were thinking about quitting anyway and instead you get fired and given a severance package, your perception may be quite different.

The stress is created entirely by your reaction to the event. Different thoughts about the same event lead to different stress levels. One person believes they'll never find another job. It's a disaster. High stress. The second person believes it's fate, and that they'll find an even better job. This turn of events is exciting. Low stress.

The key here is that whether the second belief system is realistic simply doesn't matter. Stress is created, or not, only by how you perceive what is occurring.

There is more advice on this topic than you could read in a lifetime - much of it good. *The Power of Now*, by Eckhart Tolle; *The Monk Who Sold His Ferrari*, by Robin Sharma; *Co-Dependent No More: How To Stop Controlling Others And Start Caring For Yourself*, by Melody Beattie. You could read them all, and many others. But most focus on a few universal truths.

- Live in the present; dwelling on the past, or anticipating the future, creates stress;
- Striving to control anything other than your own actions creates stress;
- Beliefs powered by "should" create stress; and, the good news,
- Your ability to change your life is far greater than you think.

It starts with this thought - "it is what it is". Accept what happens. Stop judging every occurrence in your day. That will free up energy you can use to start changing your life. Energy you can use to make each day more the way you'd like it to be.

And that's a goal worth pursuing, especially for us type A's. 🧠



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Robert Hawkes, QC is the former Managing Partner and Firm Chairman of JSS Barristers in Calgary. His practice focuses on commercial litigation, shareholder disputes and class actions.

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Prepaid Rent or Security Deposit? It's All In the Drafting.

By Devin Mylrea

In 2015, Alberta's Court of Queen's Bench and Court of Appeal were asked to determine whether the sum of \$3,187,500 (the "Deposit") paid pursuant to a commercial lease (the "Lease") was a security deposit or prepaid rent. The Court in *Alignvest Private Debt Ltd v. Surefire Industries Ltd*, 2015 ABQB 148 ("Surefire"), upheld in *York Realty Inv. v. Alignvest Private Debt Ltd.*, 2015 ABCA 355, ultimately ruled that the Deposit was a security deposit and not prepaid rent. For the Landlord, York Realty, the result required them to deliver up the Deposit to the trustee in bankruptcy.

In *Surefire*, the matter began as a result of the sale and subsequent leaseback between York Realty Ltd., as the purchaser and landlord ("Landlord"), and Surefire Industries Ltd. as the seller and tenant ("Tenant"). Under the terms of the Lease, the Tenant was required to provide the Deposit to the Landlord. Rather than being paid in cash, the balance due on close for the sale of land was adjusted to reflect the Deposit held by the Landlord.

The wording in the Lease in regard to the deposit were as follows:

6. Security Deposit/Rent Credit

(a) The Tenant will pay to the Landlord ... a deposit of ... \$3,187,500 plus goods and services tax (the "Security Deposit"), which Security Deposit is to be held without interest by the Landlord as security for the performance by the Tenant of its obligations under the Lease ... Subject to the foregoing, the Security Deposit will, provided that the Tenant has paid all amounts due to the Landlord under this Lease and is not otherwise in default ..., be applied during the term as follows:

The Deposit would be applied to monthly rents starting on the 13th month of the term and thereafter certain specific months to follow during the term. The Deposit could also be applied in the event of default by the Tenant. As is typically the case, the Landlord did not register its interest in the Deposit with the Personal Property Registry.

During the tenancy, the Tenant was granted an initial order under the Companies' Creditors Arrangement Act ("CCAA"). Not long after, the CCAA proceedings were terminated and the Tenant was placed into receivership by Alignvest Private Debt Ltd ("APD"). APD was a secured creditor of the Tenant and held a registered security interest over all of the Tenant's assets. In the period of time leading up to the appointment of a receiver, the Tenant had defaulted on payment of rent to the Landlord. However, the Landlord chose not to exercise its rights under the Lease to apply the Deposit to the default in rents at that time. The Tenant later brought the rents current. The Tenant was declared bankrupt and, during the period of time the Tenant was not in default, the trustee in bankruptcy disclaimed the lease.

In the subsequent dispute between the Landlord and ADP, ADP asserted the position that the Deposit held by the Landlord was

the Tenant's property and therefore subject to ADP's secured interest. The Landlord's position was that the Deposit was in fact "pre-paid" rent or, alternatively, non-refundable deposits to be applied to rent regardless of default, and therefore rightfully the Landlord's.

In order to determine the character of the Deposit, both the Court of Queen's Bench and the Court of Appeal looked to the specific terms of the Lease. In assessing the characterization of the Deposit, the following were found to be indications that the Deposit was in fact a security deposit:

- The Deposit was "to be held without interest by the Landlord as security for the performance by the Tenant of its obligations under the Lease" and if the Tenant was not in default, the Deposit would be credited to the rent periods identified in the Lease;
- The terms "Security Deposit" and "Prepaid Rent" in various clauses of the Lease were indicative of an intention to treat the concepts differently:
 - In the section of the Lease entitled "Security Deposit/Rent Credit", the Deposit was defined as a "Security Deposit"; while a separate amount of \$500,000, credited to the Tenant for initial rents, was described as "prepaid rent".
- In the event the Landlord had to apply the portion of the Deposit to rent arrears or other defaults, the Tenant would have been required to make payment to replenish it. This notion of replenishment was found by the Court of Appeal to be inconsistent with the concept of prepaid rent, as prepaid rent is generally a set amount to which the landlord is entitled upon execution of the Lease, and not an account that requires replenishment;
- The Deposit was only applicable to future rents as they became due, and not immediately credited to the Landlord;
- Other terms of the Lease could result in the Deposit being refunded/reverting to the Tenant, including in the event of a disclaimer of the Lease confirmed by a court, as it was in this case.

Based on the wording of the Lease, and the fact that the Deposit could be refunded to the Tenant in certain circumstances, both Courts determined that the parties intended the Deposit to be a security deposit and not pre-paid rent. The Deposit, therefore, was property of the Tenant.

In her decision, Justice Romaine further held that the Landlord had a security interest in the security deposit which could have been registered under the terms of the *Personal Property Security Act (PPSA)* and perfected. But as stated earlier, and as is commonly the case, the Landlord did not register its interest. Romaine, J. further held that the Landlord's Deposit did not fall

CHOOSE FROM ALBERTA'S TOP MEDIATORS AND ARBITRATORS



continued from p. 18


within the exclusions set out in sections 4 (f) and (g) of the *PPSA*. Consequently, the Landlord's claim to the security deposit was unsecured and subordinate to ADP's perfected interest.

On Appeal, the Justices upheld the security deposit finding, and so were not required to assess the further issues of the requirement to register the security interest, or the applicability of the exclusionary sections in the *PPSA*. They further confirmed they did not endorse the lower court's finding on those points as they were not necessary to the decision required to be made.

The Court of Appeal, however, addressed the issue of set off with regard to the Landlord's entitlements in bankruptcy, and applied the *Bankruptcy and Insolvency Act* and the *Landlord's Rights on Bankruptcy Act* in granting the Landlord set off for 3 month's accelerated rents and for damages for repairs to the premises.

Despite the Court of Appeal's refusal to endorse the decision regarding the security interest issue, *Surefire* provides a cautionary tale and guidance to landlords on how to potentially minimize the risks arising from a tenant's insolvency. In particular:

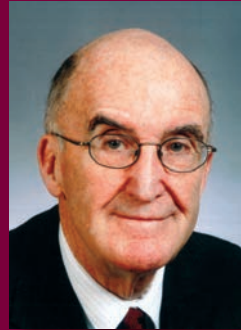
- Ensure when drafting a lease, it demonstrates a clear intention to characterize pre-paid sums as irrevocable, non-refundable amounts capable of immediate credit to the landlord upon execution of the lease, and not as security deposit for performance of tenant covenants;
- In the case of existing Leases, where an insolvency event is imminent or warning signs exist (and the tenant is in default), may well warrant applying the security deposit without delay to cure the default before an insolvency filing occurs or creditors take enforcement action; and
- If a landlord intends to have a security interest in a deposit, perfect the security interest in accordance with the Personal Property Security Act (Alberta), or applicable legislation in other provinces. Such a decision is subject to weighing the cost and administrative effort to do so which may practically include requests for priority from tenants' lenders, and requests for discharges long after the tenant has vacated the premises.

Surefire signals a development that requires landlords to more carefully consider drafting Lease provisions that govern security deposits and pre-paid sums. In particular, the cases highlight some of the mechanisms available to landlords to protect their rights to security deposits or pre-paid sums. 

With thanks to Ana Pagkatipunan, Student-at-Law, for her able assistance.



Devin Mylrea is a Partner with Shea Nerland Calnan LLP in Calgary, where he practices in the Business Law and Commercial Real Estate Groups. Devin is also a member of the CBA Alberta Editorial Committee.



The Hon. John C. (Jack)
Major, C.C., Q.C.



The Hon. W. Vaughan
Hembroff, Q.C.



The Hon. Ernest
Marshall, Q.C.



Clint G. Docken, Q.C.



Graham Price, Q.C.



E. David D. Tavender,
Q.C.



Harold W. Veale, Q.C.



Robert B. White, Q.C.

North

From the desks of Bonnie Bokenfohr and David J. Hiebert

We have exciting news for all you hardworking Section Executives! We are hosting the **NEW AND IMPROVED** Spring Section Executive Workshop on May 31 starting at 12 noon at the CBA offices. This is not your father's Section Executive Workshop—we have totally revamped it to take it from a boring old lecture format to become a facilitated section planning session. The concept is to get all (or most) of the executive from each section around the same table to complete the necessary CBA paperwork (the budget, the number of meetings, a list of the executives and their roles), and get the section meetings for the first half of the Section year planned out and assigned to each executive. We are hoping to also release to the Executive our new Section Manual full of all sorts of useful section information. (A special thanks to Karen McDougall, our very own former North Section Coordinator, for taking on this mammoth project.) We will also be releasing our very own handy-dandy Section Meeting Planning Checklist to help our volunteer Section executives remember all the tasks they need to do when arranging a speaker for their Section meetings.

We are nearing the end of our Section year which has been, by all accounts, a great one! Our northern Sections have had presentations on: dealing with experts, dealing with unrepresented litigants, prime contractors, an update on the temporary foreign worker program, using indigenous knowledge to build treaty rights, case law reviews, case law updates, views from the bench, Alberta's economy, the "new"

duty of good faith, medical marijuana in the workplace, review and assessment of lawyer's accounts, things that drive a Law Society Practise Advisor crazy, top 12 approaches to advocacy, and the legality of Uber. Wow! If you interested, some of these presentations have been recorded and can be viewed on the CBA Alberta website from the privacy of your own office.

As the Section year is coming to a close, on behalf of all the CBA members in North Alberta, we wish to thank all the 2015/16 executives for volunteering to be on the executive of your Section, and give a special thank you to our own Section Registrar, Heather Walsh, and her hard working staff, Melissa Surette and Sheilagh Marks, who do a lot of unrecognized work behind the scenes to make our CBA section meetings run smoothly. Great job everyone! 🍷



David Hiebert is a partner at Witten LLP in Edmonton. David is a long-time CBA member and volunteer, having served on Council, as a member of the Alberta Law Conference committee, and as chair or co-chair of a number of different sections.



Bonnie Bokenfohr is in-house counsel and the Public Complaint Director with the Edmonton Police Commission. Bonnie has been a member of the CBA since her very first days at the bar, serving on the executive of the Privacy Section for many years.

South

From the desks of Kate Bilson and Sean FitzGerald

Spring is truly springing now and the longer days are bringing with them a definite sense of energy.

As we enter the home stretch for section activity for the 2015-16 year, it is clear that this energy is propelling the sections through to the end of a busy and interesting year. A host of topics are in store for section meetings canvassing everything from sessions on forecasting Alberta's economy to legal update townhalls. The Young Lawyers' section will even be doing some axe throwing later this month! Early May will bring a kickoff meeting for a new Internationally Trained Lawyers section, which we hope can fulfill a need that has been increasingly evident over the last few years. In the meantime, thank you to everyone who volunteered to help with Law Day. It is an important way to help connect our profession and the legal system with the public.

There are a couple of initiatives that may be of interest to various sections. Changes are being made to the Queen's Bench Case Management process and section members are invited to express their opinions about the intended changes. In addition, the Alberta Law Reform Institute has just published a report on reviewable transactions, which recommends the adoption of the Uniform Reviewable Transactions Act. Information about both of these projects is available now.

It is also time to start thinking about what kinds of contributions you might like to make for the next CBA year. We strongly encourage all members to think about volunteering your time on

a section executive, a provincial or national standing committee, or as a mentor to a first year law student. As well, we will be hosting a section planning workshop for section executives on May 9, 2016 from 12:00 to 1:30pm, which will include an information session, as well as time for section executives to do some planning for the 2016-17 CBA year. One of our goals is to bring section executives together to discuss opportunities for joint section meetings - something we believe can only enhance the section membership experience.

Please be sure to take a look at the calendar online at www.cba-alberta.org to find out what the sections have in store for the coming months. If you have any questions about section membership or how to get involved, we are both here to help or, alternatively, please feel free to contact Linda Chapman at the CBA office. 🍷



Katherine Bilson, LL.M., is Senior Legal Counsel, Litigation & Employment Law at TransCanada PipeLines Ltd. She primarily practices in the areas of employment, pension and privacy law, and is also an instructor in MRU's Human Resources Certificate Program. Katherine is also a South Section Coordinator for CBA Alberta.



Sean FitzGerald is a partner with Miles Davison LLP in Calgary, where he primarily practices in general civil litigation. Sean has previously sat on the executive committees of the Civil Litigation, Employment Law and Insolvency Law sections.

University of Alberta

A hot topic lately at school is finding articles in the declining economy and the upcoming articling weeks this summer for 2L students. A year ago this time I was struggling to balance paper and exam time with articling application time. With some due dates for applications being May 1 or shortly thereafter it doesn't give 2Ls much time to prepare applications after the exam period.

The first decision to be made is where to apply. Luckily for me my top choice was in a city outside of Toronto, Ontario, which had applications due May 1. This deadline was followed by Edmonton at a later date in May, Vancouver at the end of June, and Toronto in August. If a student's top choice holds articling week at a later date, it's difficult to decide whether to apply to other cities as well. My suggestion is to apply broadly to cities and firms you have a genuine interest in. If you don't have a concrete connection with a city, find one!

When applying to firms I did not discriminate in the size or type of the firm. A friend gave me advice that it was better to apply everywhere and turn down an interview later, rather than apply to only a few firms and not receive any interviews at all. My cover letter beamed about the city I was applying to and my many connections to it, since I was also told firms will ask why you chose that city. He was right; they did. After my first interview I came out confident. Wanting to practice in the city I was interviewing in made the interview an honest easy

By **Lyndsay Butlin and Juliana Ho**

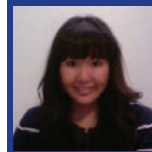
conversation about the firm and myself.

One of the best things I did during my interviews was ask to speak to the firm's articling students. The interviewers will give an overview of the job description, but nobody knows the job better than those who are currently doing it. I found I could also ask questions I was uncomfortable asking the interviewer, such as hours, pay, and hire back rates. It also gave me a better understanding of the firm.

Articling week was a stressful time and after the interviews and receptions I still wasn't sure if I'd come out with an article or if I would do another round of interviews elsewhere. I was lucky enough to get a job in that city, but many people don't, which is why it's important to apply broadly and to be selective after the interview process instead of before. 🗣️



Lyndsay Butlin is the Co-Chair of the University of Alberta Law Students section. She is currently in her third year at the Faculty of Law, and will be articling at Agro, Zaffiro LLP in Hamilton, Ontario



Juliana Ho is Co-Chair of the CBA Law Students section at the University of Alberta Faculty of Law, and is in her second year of studies. She is born and raised in Edmonton.

University of Calgary

After a busy semester, preparation for finals is in full swing! While 1Ls and 2Ls are looking forward to (another) notch in their law-degree belt, 3Ls are writing their last finals before moving onward and upward to articling and other exciting opportunities. This semester, like others, have been eventful and memorable; however, unlike the others, this semester was monumental as it marked the Faculty of Law's 40th Anniversary. The annual reception celebrated the Ruby Anniversary at the Calgary Petroleum Club with lots of great food, entertainment, and company. In addition, students had the honor of have a Fireside Chat with Justice Abella of the SCC, hosted by the Pro Bono Students Canada Calgary; hearing Preston Manning speak for the 2016 William A Howard Memorial Lecture, presented by Borden Ladner Gervais LLP; and other remarkable and accomplished individuals.

Early spring, the CBA Student Section hosted its first small, mid-sized, and regional firms networking event, "Small Firm, Big Connections", in partnership with the Career & Professional Development Office, the Rural Energy & Agricultural Law Society, and Moot Times. This interactive breakfast offered students an opportunity to have intimate conversations with small firm practitioners working in various practice areas, including family, criminal, wills and

By **Geeth Makepeace and Holly Wong**

estates, personal injury and litigation. As the result of the impressive turn out of practitioners and students, we plan to host a similar event in early summer to offer our incoming 2L and 3L students an opportunity to continue exploring their options by meeting with lawyers in different practice areas and from different firms over the summer break. Stay tuned for more details!

Last, but not least, this semester also marks the end of the first year of the Calgary Curriculum, an innovative approach to engage students in a rigorous program in order to prepare them for the complex, yet rewarding legal profession. After a year of hard work, the students are ready to take on summer - whether it be traveling or working - and wishes all an enjoyable summer! 🗣️



Geeth Makepeace is a second year JD/MBA student and Co-Chair of the University of Calgary Law Student Section. Previously, Geeth worked in operations and compliance for a number of major financial institutions.



Holly Wong is first year law student at the University of Calgary, and Co-Chair of the University of Calgary Law Student Section. She currently serves on the Board of Directors of the Servants Anonymous Society. Previously, Holly obtained her MA from the University of Calgary.

In Transition or Recession... Staying Connected Through Pro Bono Legal Work

By Nonye Opara and Kendall Moholityny

Pro Bono Law Alberta (PBLA) saw the end of an era on April 1, 2016 when Ms. Gillian Marriott, QC, stepped down as Executive Director, a position she had held since January 1, 2009. Under Ms. Marriott's guidance, PBLA created several initiatives to engage lawyers in pro bono legal service, assisting thousands of Albertans over the years with their legal matters. PBLA's Board of Directors and Staff wish Ms. Marriott well as she moves on to the next phase of her professional life.

PBLA welcomes Ms. Kendall Moholityny as incoming Executive Director effective April 1. Ms. Moholityny has served as Deputy Executive Director for the past two years and is currently a Co-Chair of the CBA Alberta Branch Access to Justice Committee. PBLA remains committed to promoting pro bono opportunities for lawyers, with the goal of increased access to justice for all Albertans. To discuss how you can become involved in pro bono, contact Ms. Moholityny at kmoholityny@pbla.ca or visit www.pbla.ca/volunteer

The practice of law is in a constant state of flux. Amendments to rules, laws and procedure, economic downturns, temporary work leaves and retirement are all changes that potentially affect how, when and where the practice of law is conducted. In some cases, these changes may even mean a complete disconnect from the law.

For lawyers looking to keep their fingers in the legal pie, especially those on temporary leaves of absence, in between jobs or semi-retired, these changes provide a unique opportunity to rethink their involvement in legal practice. Enter pro bono legal assistance - the tested (and law society - approved) option to stay connected to legal practice while making a world of difference for individuals and groups that are unable to afford the cost of legal services.

Thankfully, the services that lawyers provide will almost always be in demand, even though the method and medium of legal service delivery may change with time. This is particularly so in periods of economic decline such as the one we currently face, when the paying power of the average individual takes a dive. Massive layoffs, with its attendant legal and social challenges, may mean a shift in prominence to new areas of law and potentially create the need to explore practice in a different area. Pro bono engagement creates a low-pressure environment to acquire new knowledge, expand existing understandings and in most cases, pick up a new skill set or two.

Several other benefits potentially accrue from the provision of pro bono legal service during downtimes or periods of transition. In addition to ensuring that lawyers stay current in the ever-changing world of legal practice, volunteering time on a pro bono basis, especially in organized pro bono settings like a legal clinic, offers opportunities for networking that could come in handy when economic tides turn for the better or upon return to full legal practice. Perhaps, the icing on the cake is the invaluable sense of self-gratification that comes from helping an individual or organization to navigate their legal issues when they have

little or no recourse to alternative legal assistance.

One of the many beauties of pro bono legal service is your power to choose when, how, where and how much of your time and expertise you wish to give. From summary legal advice and brief legal services, to limited scope retainers and full carriage of case files, opportunities for pro bono service can be tailored to meet your schedule and interests.

What is more, you can also choose whether to provide these services informally or formally through organized pro bono service providers (a list of pro bono opportunities for lawyers in Alberta can be accessed at www.pbla.ca/volunteer). Formal engagement with pro bono legal service delivery offers added benefits like on-site support staff, training, schedule management and insurance coverage (in cases where a lawyer provides pro bono services through an approved pro bono service provided).

Volunteering has meaningful and positive impacts for access to justice and the administration of justice. The benefits for continuing professional development are varied as is the personal satisfaction that comes from using specialized skills to give back by doing what only lawyers can do - providing legal help to those in need. Whatever your transition, try pro bono ... you'll love it! 🍷

PBLA thanks all lawyers, articling students and law students who continually volunteer their time and expertise in various capacities and programs across the province.



Kendall Moholityny, LLB, is the Executive Director of Pro Bono Law Alberta. She is also the Co-Chair of the CBA Alberta Branch Access to Justice Committee.



Nonye Opara is the Program Manager at Pro Bono Law Alberta. Nonye is a graduate of the LL.M program at the University of Calgary's Faculty of Law, and was an active volunteer for both the CCDC and QB Amicus projects prior to joining PBLA.

Discovering Ways to Maximize Value

By Jennifer Flynn

Getting to the heart of what keeps members of the Alberta legal community up at night (and what keeps them going all day!) helps us better define value from a customer perspective.

When we embarked on a comprehensive discovery process here at LESA, I hoped it would give us deeper insight into the current challenges faced by Alberta lawyers, articling students, and their staff. In reviewing countless interview transcripts, surveys, and emails, I've been touched by the stories and ideas our customers have been sharing with us. These insights are helping to inform developments in our programs, resources, and the ways we connect with you.

2016/2017 Educational Calendar

While our discovery activities remain ongoing, we've been using knowledge gleaned from this process to maximize the value in our 2016/2017 programming. Our new educational calendar hits desks later this spring, but you can save the dates now for the following popular programs:

- Our 50th Annual Refresher program runs May 6 to 8, 2017 in spectacular Lake Louise. Mark your calendars for this very special event.
- Our 6th Annual Law and Practice Update program runs October 14 and 15, 2016 in Calgary. Of particular benefit to those working in solo or small-firm contexts, this program covers a wide range of practice areas and practice management strategies.
- Our Basic Collaborative program runs September 30 and October 1, 2016 in Edmonton. This program is open to lawyers, financial planners, and mental health professionals. Save the date for this annual program.
- Our Interest Based Negotiations program runs October 20 to 23, 2016. This program has limited registration, book early!
- Our Mediation of Family & Divorce Conflicts program runs May 15 to 19, 2017. Join us for over 40 hours of intensive hands-on skills training.

LESA Classroom

We know your learning needs won't always coincide with the dates and locations of our scheduled programming. Our "always open" online LESA Classroom hosts both seminars on demand and online self-study modules. Stream video recordings from select programs that you missed attending in person, and choose from more than two dozen available titles, including sell-out programs such as Questioning.

LESA Library

We know your work doesn't always stop when you leave your office. Our online LESA Library subscription lets you access legal information from any computer or mobile device. View and download practice manual and fundamental series content, seminar materials, checklists, fillable forms, and editable precedents.

The newest addition to the LESA Library is our brand new Alberta Wills and Estates Practice Manual, with more than 25 chapters comprising over 500 pages of content.

LESA News

We know it's important for you to stay connected on your own terms, which is why we offer several ways for you to keep up with legal education news.

- Subscribe to LESA's E-letter for regular email updates, special offers, discounts, and giveaways at LESA.org/subscribe.
- Follow LESA's blog (blog.lesaonline.org/) for legal community news, guest posts, volunteer profiles, CPLED information, and more.
- Engage with us on social media. Like us on Facebook, share with us on LinkedIn, and help us keep the conversation going on Twitter (#lesaonline).

For more information - including upcoming programs, seminars on demand, online self-study courses, publications, or the LESA Library - visit LESA.org.



Jennifer Flynn is the Executive Director of the Legal Education Society of Alberta and the Director of the CPLED Program in Alberta.



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Reform Matters

By Sandra Petersson

Looking Forward From Old Laws

The Alberta Law Reform Institute [ALRI] has just issued two new reports that touch on very old laws.

Reviewable Transactions (Final Report 108)

The law of fraudulent preferences and conveyances is outdated and still relies on the English *Fraudulent Conveyances Act*, 1571. The law in this area also lacks a clear policy foundation and needs to be clarified and modernised. ALRI has reviewed the *Uniform Reviewable Transactions Act* adopted by the Uniform Law Conference of Canada and recommends that the Uniform Act be implemented in Alberta. Implementing the Uniform Act would also complement the modern legislative framework established by the *Civil Enforcement Act* and the *Personal Property Security Act*.

Key changes that would flow from implementing the Uniform Act in Alberta include:

- Balancing the right of creditors to recover what they are owed against the right of a transferee to be free from unsuspected claims to property or value received from a person who has creditors;
- Focussing on the effect of a transaction (did it impede or defeat creditors' rights of recovery?) rather than the intention of its participants;
- Considering whether the transferee was in a position to recognise that the transaction was vulnerable because its terms were too good to be true or the transferee knew of and facilitated the debtor's intention to obstruct creditors.

ALRI's Report includes a sample draft Reviewable Transactions Act as an example of how the Uniform Act might be implemented in Alberta. The Report also includes the Uniform Act and Commentary as an Appendix for reference. The Report is available on ALRI's website: www.alri.ualberta.ca/index.php/publications/Series/final-report/reviewable-transactions.

Perpetuities Law: Abolish or Reform? (Report for Discussion 29)

The rule against perpetuities was developed by English courts in the 17th century as a way to prevent landowners from using future and contingent interests to tie up property for generation after generation. Over the centuries, courts expanded the rule with the result that it applies to virtually all future or contingent interest in property, regardless of whether the interest is real, personal, legal or equitable. The rule and its expansion have resulted in a complex and virtually incomprehensible body of law that is often misapplied and misunderstood.

The rule against perpetuities may be the hallmark example of out-dated law. But what effect would abolition have? Would reform make the law simpler?

ALRI's Report reviews the law of perpetuities but does not take a position on whether perpetuities should be abolished

or retained in Alberta. ALRI's Report asks for your input on the following key issues relevant to trusts:

- Should perpetuities law be abolished?
- Are modern legal mechanisms such as the deemed disposition rule in tax and variation of trusts law sufficient substitutes for perpetuities law?
- If perpetuities law is retained should it be reformed along one of the following models:
 - Retain the wait and see principle but allow a choice between a fixed perpetuity period and a perpetuity period calculated by reference to lives in being;
 - Retain the wait and see principle but replace the concept of lives in being with a fixed perpetuity period for vesting;
 - Replace perpetuities law, lives in being, vesting and the wait and see principle with a legislated fixed duration period for trusts.

Whether perpetuities law is abolished or retained it will also be necessary to determine how various non-trust and other interests are handled.

The Report is available on ALRI's website: www.alri.ualberta.ca/index.php/publications/Series/report-for-discussion/the-perpetuities-act.



Website: www.alri.ualberta.ca

Email: reform@alri.ualberta.ca

Twitter: @ablawreform



Sandra Petersson is the Executive Director of the Alberta Law Reform Institute. She joined ALRI in 2002, having previously held the positions of Counsel and Research Manager. Prior to joining ALRI, Sandra clerked for the Supreme Court of Canada, worked as Executive Legal Counsel to the Chief Justice of Alberta.



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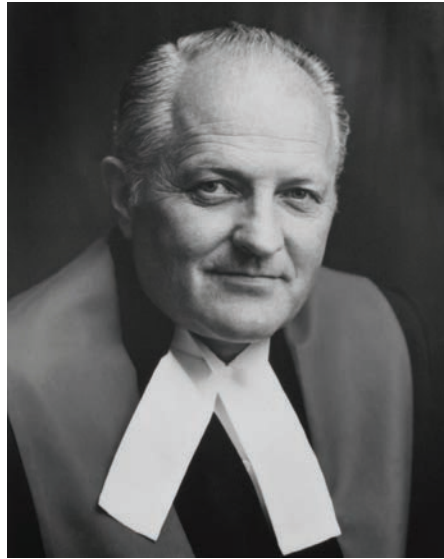
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The Honorable William W. Kenneth Moore, CM, LL.D, Q.C.

By Rhonda Wishart

The entire Alberta legal community was saddened by the recent loss of the "Chief" who passed away peacefully in his sleep on March 31, 2016. The Chief presided in Alberta courts for nearly 30 years, accepting an appointment to the Supreme Court of Alberta, Trial Division in 1972, an elevation to Associate Chief Justice of the Court of Queen's Bench in 1981 and then to Chief Justice in 1984. Ken continued as Chief Justice until retirement from the Bench in 2000. Ken was the longest sitting Chief Justice in Alberta and quickly earned the admiration and respect of the Alberta Bar as a fair and reasoned judge who was never outworked by counsel.



He was a favourite at the BD&P lawyer lunch table where he continued to "hold court", treating young lawyers to great war stories from his past.

Ken's numerous accomplishments include Vice Chairman of the Canadian Judicial Council, 1988-1990, induction onto the Sports Wall of Fame and the award of an honorary Doctorate of Laws from the University of Alberta, 1988 and the award of an honorary Doctorate of Laws from the University of Calgary in 1999. Ken was recognized with a Distinguished Service Award from the Alberta Law Society and Canadian Bar Association in 2000, the Queen's

Golden Jubilee Medal in 2003, the Order of Canada in 2007 and the Queen's Diamond Jubilee Medal in 2012.

Ken was born December 5, 1925 in Calgary and after graduating from high school, he trained in the Royal Canadian Navy as a wireless telegrapher. During WWII, Ken was stationed in Halifax aboard the destroyer HMCS Quappelle. After the war, Ken attended the University of Alberta, where in addition to a budding interest in the law, he displayed a great talent for football. Ken played for the University of Alberta Golden Bears and later for the first Edmonton Eskimo team in 1948-49 and for the Calgary Stampeders in 1946 and 1950-51. After graduation from law school in 1952, Ken joined the law firm Shouldice, Milvain & MacDonald, which would later become Moore, Loughheed, Atkinson, McMahon & Tingle.

In addition to his professional achievements, Ken was a tireless volunteer in his wider community. He coached his sons in minor hockey and over the years held executive positions with the Federation of Community Associations, the Calgary Family Service Bureau, St. Mary's University, the Calgary Booster Club, the Catholic Charities of Calgary, the Calgary Boy Scouts Association, the Downtown Rotary Club, the Stampeders Football Club, the Naval Museum of Alberta, the Calgary Golf and Country Club and the Calgary Exhibition & Stampede.

After retiring from the Bench in 2000, Ken joined Burnet, Duckworth & Palmer LLP as Counsel, where he successfully completed over 100 mediations and arbitrations and continued to attend the office until recently. As one lawyer in a mediation proceeding before Ken commented "it feels like arguing with your grandfather and who can do that - it settled in record time". Ken was well loved at BD&P where he served as colleague, mentor and friend to many.

Ken, whose greatest treasure was his family, was predeceased by his loving wife, Audrey, on November 25, 2014 and is survived by his seven children and their spouses: Joan (Yves) Gauthier, Jim (Linda) Moore, Dan (Gina) Moore, Bill (Allison Hakomaki) Moore, Maureen (Larry) Hobden, Tracey Moore-Lewis (Ward Lewis), and Bob (Jody) Moore as well as 20 grandchildren and 3 great grandchildren. The Chief has truly left a wonderful legacy. 🕊️

Judicial Updates

COURT OF APPEAL

The Honourable Mr. Justice P.W. Martin (Calgary) elected supernumerary status effective December 31, 2015.

The Honourable Mr. Justice J. Watson (Edmonton) elected supernumerary status effective January 1, 2016.

COURT OF QUEEN'S BENCH

The Honourable Madam Justice B.E. Romaine (Calgary) elected supernumerary status effective January 1, 2016.

The Honourable Madam Justice D.C. Read (Edmonton) elected supernumerary status effective March 1, 2016.

PROVINCIAL COURT

The Honourable Judge H.R. Chisholm (Edmonton) retired as a supernumerary judge effective March 9, 2016.

Justice of the Peace C.B. Wheatley (part-time, Medicine Hat) was appointed as an ad hoc Justice of the Peace effective April 12, 2016.

A VIEW FROM THE BENCH

By The Honourable Judge A.A. Fradsham

The word “spin” has various definitions, but the one which came to my mind last month is well expressed in the *Oxford English Dictionary Additions Series, Volume I* at p. 315: “A bias or slant on information, intended to create a favourable impression when it is presented to the public”.

We have all been the recipients of “spin”. For example, included with one’s bank statement will be a notice announcing that in an effort to serve you better the bank is modifying its service fee structure. The notice fairly drips with concern for your welfare. The glowing prose is such that conjured before you are images of tireless bank officers hunched over their respective desks working long into the dark and cold night as they try to find ways to make your life less brutish and your burdens less weighty. We are talking about rooms full of Albert Schweitzer-types, all dedicated to orchestrating the banks business practices so that your life is easier. Sadly, trained as we are to read the fine print, we soon discover that the changes effected to the “service fee structure” are two-fold: the number of things the bank will do without charging a service fee is decreasing, and the service fees previously charged are increasing. That is “spin”. That which is touted as being a benefit to you is, in reality, a detriment to you as spinee and a benefit to someone else as spinor.

Last month, I had a close encounter of the third kind with a master of spin. I went to a bank branch located in the small town near where I live. My purpose was pro-social, perhaps even noble: I wanted to pay money to the Government of Canada (the quarterly rendering unto Caesar that which is Caesar’s). When I entered the bank, clutching my remittance form and a cheque representing my humble offering, I was encouraged to see that there was only one other customer in the customer counter area, and she was being attended to by the one teller on duty. Consequently, I was at the head of a queue of one, and fully anticipated being served very soon. The customer currently occupying the attentions of the teller did not seem to be trying to cash a stale-dated, third party cheque, made out in Króna, and drawn on a community credit union located in Reykjavik, Iceland; I felt pretty optimistic about concluding this visit quickly.

Suddenly, I noted a smiling bank employee standing next to me.

“Do you want to use our automated service?” she asked.

“No, thanks,” I replied, “I am happy to deal with a real, live human being.”

“What do you want to do?”

“I want to pay money to the government.” I confess I may have carelessly used the word “want”.

“You could do that at the ATM”, she noted helpfully. That too may be a careless use of the word “helpfully”.

I looked over at the ATMs located in the foyer of the branch, and which I had passed as I came into the branch proper. Those were the machines with people waiting in a queue to use them. I looked back at my current position of being next in line to access a teller who gave every sign of finishing with the one other customer. “No thanks. I’ll just deal with a teller.”

With that, the woman left my side, walked behind the teller counter, and invited me to attend upon her at the sacrificial altar, I mean the service counter. As I approached, the previous non-Icelandic customer left the other teller.

I presented my remittance form and cheque.

“You could do this at the ATM.”

“I would rather do it in person and have my form date stamped by the bank.” In a moment of weakening resolve, I pointed out that on the form the Government of Canada, regulator of banks, and holder of first charge on my soul, had declared that I could make the payment at any chartered bank.

“The ATM would give you a date stamp.” I had visions of a great mechanical arm shooting out from the wall and rubber stamping whatever was before it... like my forehead.

“Do you bank on-line?” she asked with just a tinge of an accusatory tone, as it became evident to her that I was a reactionary pocket of resistance in the technological revolution (doubtless I am, but I hope it is a protected status under some obscure provision in the *Charter*).

“Yes”, I replied.

“Have you done banking with your phone?”

“Yes”, and then offered in my defence, “I have even deposited cheques into my account using the phone’s camera.” I felt that I was marginally holding my own as long as she didn’t start to question too closely my re-cycling habits.

Happily, at that moment, she tired of trying to convince me that it would be to my great advantage to spend more time waiting in a queue to use an automated system which coincidentally would allow the bank to cut its costs by eliminating employee positions. She took my cheque, stamped my form, and bid me a dismissive adieu. And it was then that the meaning of the word “spin” became crystal clear to me. I must be a visual learner. I wonder if the bank has considered imposing a service charge for teaching by example. 🙄



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. Rackel Belzil LLP is seeking the will for Patricia Marie Claire Roach, late of Edmonton. Please contact direct: **780-424-2929 or mail: 100, 10230 - 142 Street, Edmonton, AB T5N 3Y6.**

WILL SEARCH. Douglas Arthur McGregor, born October 11, 1954, died February 18, 2016 in Calgary. Please contact **Suzanne Laurin at 403-500-6400 or 403-470-2928.**

WILL SEARCH. Leslie (Les) Arnold Friesen DOB March 11, 1948, DOD March 14, 2016. Resided in Meadow Lake, SK and Northwest and Central AB. Please contact **Tony at 780-246-4960 or Tracie at 780-904-5394.**

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