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# Law Matters

## *The Regulatory Issue*

### **Pipelines**

Who's looking out for Canada's public interest?

### **New**

### **Home Buyer Protection Act**

### ***Species at Risk Act***

Recent developments

### **Unsung Hero**

Meet the mentors



THE CANADIAN  
BAR ASSOCIATION  
Alberta Branch



# EDITOR'S NOTES

By Robert Harvie, QC

So. Here I go again, still somewhat awkward in my effort to prepare the Editor's Page of this august publication. After reviewing the content of this issue, I feel somewhat humbled that I am the lead-off hitter in an otherwise impressive team of legal talent and skill gathered to create this edition of Law Matters.

The theme of this edition is "The Regulatory Issue", and it concentrates on the ever-changing environment of administrative law, including, no pun intended, regulation of the environment. From a review of the *New Home Buyer Protection Act* by Alexander Witt, to a discussion of Federal Freightways regulation by Sylvie Lang, to an excellent "Point/Counterpoint" discussion surrounding environmental regulation in the context of the Northern Gateway pipeline by Barry Robinson and Rick Neufeld - there is an excellent and interesting discussion of various regulatory areas for our readers. The regulatory "environment" issue also includes a very interesting article by Marianne Davies regarding the tension between federal and provincial jurisdictions inherent in the federal *Species at Risk Act*.

Tying all of the regulatory topics together is the concept of the important job that we, as profession, play in assuring government accountability. While politically, we may have different points of view respecting oil pipelines, species at risk, or transportation of dangerous goods through our communities - as lawyers we all share a strong fundamental commitment to making the system accountable to all interests.

Finally, we have some great content from the rest of our contributors; including advice from Devin Mylrea on the

real health hazards of "sitting" at your job (how many of you are sitting at your desks as you read this?) An article that I particularly valued is written by John Gulak, and touches on the importance of peer support, discussing a presentation by retired Lieutenant-General of the Canadian Forces Roméo Dallaire on how peer support has a special value to recipients of that support. Throughout the CBA and our profession generally, we see so many examples of lawyers helping others - including other lawyers. Romeo Dallaire comments on the notion that as we reach out to assist and support our community - there is an added sincerity and empathy when that support comes from our peers in volunteer capacity. This then connects wonderfully to our discussion of this edition's "Unsung Heroes", Arthur Wilson, QC, and Michael Birnbaum, who volunteer through the CBA to provide mentorship to the incoming members of the legal community - students at the University of Calgary and the University of Edmonton.

As always, an excellent collection of works, which some of you are hopefully reading in the sun with a cold drink in hand, now that the rains have finally stopped.

Have a good summer, and as always, your comments or suggestions are welcomed. ☺

## Corrections:

(from Spring 2014) The surname of Michael Kraus, QC, was incorrectly spelled. Brian Curial (author of *Today's Legal Education: 50 Years Behind the Curve - Distance Education is the Future*) practices law at Miller Thomson LLP, a Canadian Bar Association Partner Firm.

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## Contributing Authors

Siwei Chen	Frank Friesacher	David Louie	Devin Mylrea
Elizabeth Coyle	John Gulak	Peter Lown, QC	Richard A. Neufeld, QC
Marianne (Chuck) Davies	Robert Harvie, QC	Ola Malik	Barry Robinson
Marian V. De Souza, QC	Patricia Johnston, QC	Gillian Marriott, QC	Dragana Sanchez-Glowicki
Jennifer L.C. Flynn	Maureen Killoran, QC	Karen McDougall	Anthony Strawson
Hon. Judge A.A. Fradsham	Kathryn Kitchen	Jenny McMordie	Sherry Wheeler
Katherine Fraser	Sylvie Lang	Kendall Moholitny	Alexander Witt

# PRESIDENT'S REPORT

By Marian V. De Souza, QC



A visit to Iqaluit, Nunavut rounds off travels over the course of nineteen years of CBA membership, attending conferences and meetings in every province and territory. Mementos of a Manitoba winter scene, an Inukshuk from Citizenship Court at Law Day 2014, and an Inuit carving, remind me of close CBA ties, the diversity of Canadian culture and beauty of our vast country.

Books on my coffee table capture the year as CBA President: *Breaking Through: Tales from the Top Canadian Women General Counsel*; *Saskatchewan Wild*; *Sick to Death of the Silence: Stories to break down the stigma of mental illness*; *Shake Hands with the Devil*, and *People, Principles, Progress: The Alberta Court of Appeal's First Century 1914 to 2014*. It is against this backdrop that I have had the opportunity to be part of the work of CBA, part of a worthy profession, and give back to a community that has been so good to me.

With support from the CBA office, your Executive has strongly advocated issues of law and justice, ranging from sustainable funding of the Calgary's drug court to reforming traffic court, and employment standards. The Branch commends initiatives of the Alberta government in leading multi-disciplinary discussions to improve justice for family matters. CBA plays a leadership role representing the legal sector, and continues to build relationships with Government, the Courts, the Law Society of Alberta, Pro Bono Law and legal clinics throughout the province in pursuit of equal justice. You can read more about the spring sitting of the Legislature, from the Legislative Review Committee summary at [www.cba-alberta.org](http://www.cba-alberta.org).

Alberta enjoys the strongest judicial membership in the country - that's numbers, not per capita, thanks to stewardship of CBA judicial liaison and past CBA President, the Honourable Assistant Chief Judge Richard O'Gorman. In keeping with tradition, greetings were brought to eighteen judicial swearing-in ceremonies before all levels of Court this year. In addition, the Branch upholds the independence of the judiciary, and in the wake of successful submissions before the Justice of the Peace Compensation Review Commission, the Alberta Branch is prepared to make submissions on behalf of Provincial Court Judges.

Momentum is also gathering to ensure Alberta's courts have a sufficient complement of judges, with CBA National President Fred Headon testifying before the Senate Legal and

Constitutional Affairs Committee in support of a resolution moved by Alberta for more superior court judges. National also spoke at the CBA Constitutional and Human Rights Law Conference about a fair judicial appointment process to the Supreme Court of Canada, and to the Senate Social Affairs, Science, and Technology Committee in favour of changes to Bill C-24, Strengthening Canadian Citizenship Act, and Bill C-13, Protecting Canadians from Online Crime Act.

This work is achieved thanks to volunteers committed to a common goal: advancing the profession, public interest and administration of justice. I encourage you to be an active member of your CBA. You will join a branch that leads the country in Portfolio and Portfolio Plus members, categories that reward your engagement. A full list of benefits and a fee calculator are available at [www.cbamembership.org](http://www.cbamembership.org).

Sections continue to be a premier professional development opportunity, offering case reviews and presentations by experts. This year, notable speakers included The Honourable Neil Wittmann, Chief Justice of the Court of Queen's Bench of Alberta, The Honourable Terry Matchett, Chief Judge of the Provincial Court of Alberta, The Honourable Lawrence Anderson, Assistant Chief Judge, Edmonton Criminal Court, The Honourable Jonathan Denis, QC, Minister of Justice and Solicitor General, and other distinguished guests. Sections continue to expand, with two new south additions in Pension & Employee Benefits Law (including webcasting for members in surrounding communities), and Municipal Law.

Another opportunity for professional development is the CBA Legal Conference to be held in St. John's, Newfoundland this month. In addition to enjoying the hospitality of our friends on the Atlantic Coast, you will be among the first to hear about sustainability of the profession in the 21st Century, as findings of the Legal Futures Initiative are revealed.

Please join me in welcoming Steven N. Mandziuk, QC, who, as Branch President for 2014-2015, will help lead this transformation with Wayne Barkauskas, Vice-President, Jeremiah Kowalchuk, Treasurer, and Jenny McMordie, Secretary. It is also my pleasure to congratulate Michele Hollins, QC, past CBA Alberta President, as she assumes her role as CBA National President.

I hope I have lived up to Honourable Judge Higa's commendation introducing my term as CBA Alberta President. It has certainly been a highlight of my career to be part of the history of this great organization and work with outstanding individuals who care about the law and the profession. The year has been especially enjoyable thanks to my Executive, Maureen Armitage, Heather Walsh, the entire CBA team, and all those who have served before and continue to make CBA Alberta strong and proud. Thank you for your confidence and commitment as we continue to grow and strengthen our profession, across the prairies, mountains, and from sea to sea to sea. 🌐

## CBA Alberta Branch President: 2014 - 2015 "Learn, Try, Stay and Care"

By Dragana Sanchez-Glowicki

I have been bestowed with the pleasure of introducing Steven (Steve) N. Mandziuk, QC, the new President of the Canadian Bar Association, Alberta Branch. I struggled as I began to write this column because there was so much I wanted to tell you about Steve. I really did not know where to start. I decided that if I summarized Steve in a few words it would be a good starting point. There were four words that immediately came to mind, "Learn", "Try", "Stay" and "Care". In my mind, these four words epitomize Steve.

"Learn". Steve is scary smart. It may be because he is an avid reader, but I very much doubt that is the only factor. I remember one evening having dinner and talking about the upcoming 5 day Banff Refresher (as it then was) on Estate Law (my sole area of practice). I was very proud to tell Steve that I was asked to be a presenter at the conference. Steve of course took a keen interest in my topic. But, after telling Steve what my paper was about, I got really scared about having agreed to be a presenter. Steve, who has never practiced in the area of Wills and Estate, amazed me because he knew so many relevant cases and legal principles. I went home and panicked. After ruling out asking Steve to write my paper for me, I was able to put the fear to work, and, I have never told Steve this, but I credit him with how much better my first writing and presenting experience turned out. That night I learned how fear can be a motivating force. Thank you Steve.

"Try". I have known Steve since 1996 (this is not a typo – we were only 15 years old at that time). Over the 18 years I have watched Steve take on very big projects and very small tasks. From coaching kids soccer to holding down his current position as General Counsel of Finning Canada, Steve approaches everything he takes on with the same passion, dedication, determination, and incredible energy. Steve has been a member of the Branch since 1991. And, true to his character, he has devoted so much time and effort to the Branch over the past 18 years. The Alberta branch of the CBA, and our members have reaped the benefit of his tireless efforts. There are simply too many contributions to the Branch to mention, but some of the more notable and recent ones are that he was one of the cofounders of the Pension & Employee Benefits section, and chaired it from 2004 to 2010. Steve was a section



coordinator (North), and on both the national and provincial CBA Council, and most recently, he was one of the members on the organizing committee of the 100 year Anniversary of the Court of Appeal. Thank you for trying so hard for all of our members. Your success has not gone unnoticed.

"Stay". Although Steve has accomplished so much, he has stayed strong and true to his first passion, his family. Steve is married to Josie, who is, in her own right, an accomplished academic. Josie has degrees in music and education and is currently working on her Masters. She is well known as an educator, choir conductor, a clinician, a music adjudicator, and has an amazing singing voice. Josie is the Artistic Director of a premier children's choir called Edmonton Young Voices. In her spare time she has managed to become a certified yoga instructor. Oh, and is a gourmet cook too. Steve has two children, Maddi who is 13 and Nicholas who is 11. Maddi is an "A" student, plays the violin, loves horseback riding and sings in Edmonton Young Voices. Nicholas is also an outstanding student, is involved in soccer and hockey and plays classical guitar, solo and as a member of a guitar orchestra. I always say, water flows downstream. Whatever is at the top will eventually flow down. This is one talented family, and it's no wonder with Steve and Josie at the top. Thank you for being an example.

"Care". Steve cares about every person in his personal and professional life. His long term friends, who he holds Oilers season tickets with, since, as Steve put it, "we all got our first real jobs", will attest to how much Steve cares about cultivating friendships and camaraderie. When I asked Steve what he likes to do as hobbies, his first response was that he likes to enjoy Edmonton's river valley. This may appear to be a simple pleasure, but it is a profound representation of the caring Steve has towards our community.

These are just some of the upstanding characteristics I have had the pleasure of experiencing during my friendship with Steve. I am proud to call him a good friend, but I am even prouder to introduce him to all of our members as our next President. Welcome to your new position, and thank you for caring enough to take on this enormous task for the benefit of all of the members in Alberta. 🍷



# WHAT'S HAPPENING

## August

15-17: The Canadian Bar Association presents the CBA Legal Conference. St. John's, Newfoundland. Visit the website at [www.cba.org](http://www.cba.org) for further details.

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## September

5: The Calgary Bar Association presents its 2014 charity golf tournament. Banff Springs Golf Course, Banff, AB. Visit the website at [www.calgarybarassociation.com](http://www.calgarybarassociation.com) for further details.

8-9: The Canadian Institute for the Administration of Justice presents Nudging Regulations: Designing and Drafting Regulatory Instruments for the 21st Century. Ottawa Convention Centre, Ottawa, ON. Visit the website at [www.ciaj-icaj.ca](http://www.ciaj-icaj.ca) for further details.

18-19: The Canadian Bar Association presents the 2014 Annual Competition Law Fall Conference. Ottawa Convention Centre, Ottawa, ON. Contact Tina Ethier at 1-800-267-8860, ext. 198 or [tinae@cba.org](mailto:tinae@cba.org).

19-20: The Canadian Bar Association presents the 2014 CBA National Construction Law Conference: Building for the Future. Toronto Board of Trade, Toronto, ON. Contact Nicole Suthers at 1-800-267-8860, ext. 198 or [nicoles@cba.org](mailto:nicoles@cba.org).

25: The Canadian Bar Association Alberta Branch presents Media and the Law Webinar, Part 1: News Media and the Law - A Primer. Online. Visit [www.cba-alberta.org](http://www.cba-alberta.org) to register and for further details.

26: The Canadian Institute for the Administration of Justice presents Ethics and Civility in the Practice of Law. Sutton Place Hotel, Edmonton, AB. Visit the website at [www.ciaj-icaj.ca](http://www.ciaj-icaj.ca) for further details.

30: The Canadian Bar Association Alberta Branch presents Corporate and Partnership Divorces: Techniques and Tips. Online. Visit [www.cba-alberta.org](http://www.cba-alberta.org) for further details.

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## October

15-17: The Canadian Institute for the Administration of Justice presents Privacy in the Age of Information. The Sheraton Hotel Newfoundland, St. John's, NFLD. Visit the website at [www.ciaj-icaj.ca](http://www.ciaj-icaj.ca) for further details.

19-21: The Canadian Bar Association presents the 10th Annual CBA Law Firm Leadership Conference. Hyatt Regency, Montreal, QC. Contact Leslie Huard at 1-800-267-8860, ext. 186 or [leslieh@cba.org](mailto:leslieh@cba.org).

22: The Court of Appeal of Alberta, Legal Archives Society of Alberta, and the Calgary Bar Association present the Court of Appeal Centenary Banquet. Westin Hotel, Calgary, AB. Visit the website at [www.albertacourts.ca/coacentennial](http://www.albertacourts.ca/coacentennial) for further details and tickets.

22: The Canadian Corporate Counsel Association presents Bundled Programs: "Paying the Right Price for External Legal Services" and "Performance Indicators for the Legal Department". Westin Hotel, Calgary, AB. Contact Sharon Wilson at [cle@ccca-cba.org](mailto:cle@ccca-cba.org).

23: The Canadian Bar Association Alberta Branch presents Media and the Law Webinar, Part 2: Social Media and the Law. Online. Visit [www.cba-alberta.org](http://www.cba-alberta.org) to register and for further details.

23-24: The Canadian Bar Association presents the 10th Annual Pan-Canadian Insolvency and Restructuring Law Conference. Château Frontenac, Québec City, QC. Contact Karen Sagle at 1-800-267-8860, ext. 196 or [karensa@cba.org](mailto:karensa@cba.org).

30-31: The Canadian Bar Association presents the 5th Annual Access to Information and Privacy Law Symposium. Ottawa Convention Centre, Ottawa, ON. Contact Tina Ethier at 1-800-267-8860, ext. 198, or [tinae@cba.org](mailto:tinae@cba.org).

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## November

27: The Canadian Bar Association presents Media and the Law Webinar, Part 3: Freedom of Expression in Canada. Online. Visit [www.cba-alberta.org](http://www.cba-alberta.org) to register and for further details.

28-29: The Canadian Bar Association presents the 15th Annual Administrative Law, Labour and Employment Law Conference: Navigating the Future - Emerging Issues for Practitioners in Administrative, Labour and Employment Law. Westin Ottawa, Ottawa, ON. Contact Tina Ethier at 1-800-267-8860 ext. 198 or [tinae@cba.org](mailto:tinae@cba.org).

Please send your notices to:  
**Patricia (Patty) Johnston, QC, ICD.D**  
c/o Alberta Energy Regulator  
Phone: 403-297-4439  
Email: [patricia.johnston@aer.ca](mailto:patricia.johnston@aer.ca)



*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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## Settlement Privilege - Clearly Contracting Out

By Maureen Killoran, QC and Elizabeth Coyle

Lawyers frequently represent clients in alternative dispute resolution and settlement negotiations. As a matter of policy, the courts encourage parties to settle in advance of trial both to: save judicial resources; and, allow parties to reach mutually acceptable resolutions without the considerable time and expense that litigation entails. In order to best represent our clients' interests during settlement negotiations, it is important to be aware of the scope of settlement privilege and its exceptions. This particularly holds true when drafting or advising clients with respect to mediation agreements.

Recently, the Supreme Court of Canada released *Union Carbide Canada Inc. v. Bombardier Inc.*, holding that parties engaged in private mediation can properly contract out of the common law exceptions to settlement privilege that allow a party to disclose confidential information in order to prove the terms of a settlement.<sup>1</sup> However, such terms must be clear. Alberta lawyers drafting and negotiating mediation agreements should take note of the Court's express rejection of the presumption that a confidentiality clause in a mediation agreement automatically displaces settlement privilege and its common law exceptions.<sup>2</sup> Following *Union Carbide*, there is a heightened need for careful and deliberate drafting of mediation agreements in order to ensure that clients' intentions are realized and their interests protected.

In *Union Carbide*, the parties were engaged in a decades-long, multi-million dollar civil suit. They eventually agreed to private mediation and entered into a standard-form mediation agreement provided to them on the eve of the mediation by the mediator. The agreement contained the following confidentiality clause: "[n]othing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding". A settlement was offered and accepted, but the parties subsequently disputed the scope of the release. In resolving that dispute, Bombardier Inc. sought to rely on evidence from the mediation sessions in its motion to have the settlement agreement approved. The issue on appeal was whether it could do so in light of the terms of the mediation agreement.


The Court was careful to distinguish between common law settlement privilege and confidentiality clauses in mediation agreements. Common law settlement privilege is a rule of evidence that promotes settlement by protecting communications and promoting honest and frank discussions between disputing parties.<sup>3</sup> Communications protected by common law settlement privilege can be disclosed in order to prove the existence or scope of a settlement. Such disclosure furthers the overall policy objective for settlement privilege - to encourage settlements.<sup>4</sup> On the other hand, confidentiality clauses are terms of binding agreements into which parties enter for a variety of reasons which may include

both commercial imperatives and settlement promotion.<sup>5</sup>

Because common law settlement privilege and confidentiality clauses in mediation agreements are distinct concepts, the Court held that the "mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it".<sup>6</sup> A mediation agreement's confidentiality clause may have the effect of preventing the application of settlement privilege or its exceptions, but in order to do so its terms must be clear.

In interpreting the confidentiality clause in the mediation agreement at issue in *Union Carbide*, the Court followed the rules of contractual interpretation codified in the *Civil Code of Quebec* (the mediation agreement was signed and performed in Quebec). Considering the nature of the agreement, the circumstances in which it was formed and the agreement as a whole, the Court found that the parties did not intend to prevent the application of the exceptions to settlement privilege. Importantly, the Court gave considerable weight to the fact that the confidentiality clause was part of an unmodified standard-form contract that was distributed to the parties the night before the mediation. Given this context, the Court required evidence that the parties "thought they were deviating from the settlement privilege that usually applies to mediation" and found none.<sup>7</sup>

Arguably, the common law principles of contractual interpretation applied by Alberta courts favour a stricter approach to contract interpretation; applying the principles of contractual interpretation of this jurisdiction may have required the Court to rely more heavily on the words of the confidentiality clause in order to determine the parties' intent. Nevertheless, Alberta lawyers drafting and advising on mediation agreements should, if their clients wish to contract out of the exception to common law settlement privilege, include express and clear language of that nature in their confidentiality clauses.

Certainly, the settlement related dispute which arose in the *Union Carbide* case should cause all lawyers to address their minds to how settlement agreements reached can be relied upon by their clients in the event of a disagreement as to the meaning of the settlement terms. 

<sup>2</sup> *Union Carbide* at para 40.

<sup>3</sup> *Union Carbide* at para 51.

<sup>4</sup> *Union Carbide* at para 64.



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.



Elizabeth Coyle is an associate in the litigation department with Osler, Hoskin and Harcourt LLP, a Canadian Bar Association Partner Firm. Prior to attending law school, she worked as a political analyst in Ottawa.

<sup>1</sup> *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 ["*Union Carbide*"].

<sup>2</sup> *Union Carbide* at para 3.

<sup>3</sup> *Union Carbide* at para 31.

<sup>4</sup> *Union Carbide* at para 35.

## Introducing the New Home Buyer Protection Board

By Alexander Witt

A new administrative tribunal has emerged into the world of real estate law, now that the *New Home Buyer Protection Act* (Act) is in force. Under this legislation, all new homes built and sold in Alberta must have home warranty insurance. Similar to the *Fair Trading Act*, enforcement and compliance measures are in place to ensure that these new rules are followed.

**Application of the Act**  
*The Act applies to all residential buildings built under a building permit applied for after February 1, 2014. Any building with a prior building permit application is not subject to the Act.*

The New Home Buyer Protection Board (NHBPB) oversees exemptions and compliance appeals. The Registrar of the New Home Buyer Protection Office, a division of the Ministry of Municipal Affairs, monitors compliance with the Act and administers exemptions. Some of the Registrar's decisions may be appealed to the NHBPB. I discuss these decisions below.

### Status Determinations

Where permit issuers or permit applicants are unsure of whether a building is subject to the Act, or where builders or owners are unsure of whether a building is exempt under the Act, they can ask the Registrar for a determination or notice of the building's status. The Registrar may determine that a building is subject to the Act, exempt from insurance requirements under a provision of the Act, or exempt from the Act entirely.

### Owner Builder Authorizations

Individuals may continue to build their own homes without purchasing home warranty insurance provided they are duly authorized. Otherwise, an individual building his or her own home must get insurance. Authorization criteria are set out in the New Home Buyer Protection (Ministerial) Regulation. An authorization application may be approved, refused, suspended, cancelled or made subject to terms and conditions. All of the appeals received by the Board to date have come from refused owner builder applications.

### Hardship Exemptions

The Act prohibits anyone, including authorized owner builders, from selling a new home without insurance during its construction or in the first ten years of the home's existence (this term is called the "protection period" under Bill 6). A person who sells a home without insurance is subject to an administrative penalty of up to \$100,000. Exemptions may be available, but are purely discretionary and reserved for cases of hardship. Owners of uninsured homes should apply for exemptions before agreeing to sell during the new home's protection period. Failure to do so is an offence under the Act.

### Compliance with the Legislation

Compliance Officers monitor the Province for compliance with the Act and may issue compliance orders. The Registrar may issue administrative penalties, which are fines for non-compliance with certain provisions of the Act, compliance orders, or terms of owner builder authorizations. Both orders and penalties may be appealed, but compliance orders must be reviewed by the Registrar first.

### The Board's Jurisdiction

The NHBPB can hear appeals of the decisions outlined above. However, the Board does not hear *Safety Codes Act* appeals, or disputes among builders, buyers, or insurers. A helpful rule of thumb: If the Registrar is not a respondent on an appeal, the NHBPB can't hear it.

### Appeal Procedures

Appeals must be filed within 30 days of the Registrar's decision. Appellants can generally expect to be asked to attend a case management meeting or teleconference shortly after the appeal is filed. At this meeting, the Appellant and the Registrar have an opportunity to discuss the merits of the appeal and prehearing appeal process.

There are two ways to resolve appeals: the Board can make a decision, or the Board can accept a joint recommendation made by the parties. For example, certain owner builder applications that were technically deficient in some way have been resolved by the parties' joint agreement. In these cases, the parties were able to come up with a way to remedy the technical deficiency. For example, a non-owner applicant applied for an owner builder authorization, which was refused on the basis that the applicant didn't own the land on which the new home would be built. On appeal, the authorization was granted following proof of a transfer to the applicant of ownership of the land on which the new home would be built.

Where the parties cannot agree on how to resolve the appeal, the case management process turns to preparing for a hearing. Parties will be asked about disclosure of information, their available dates for a hearing, and other preliminary matters related to the appeal. If parties cannot agree on dates, disclosure or other procedural matters, then the case manager will call a preliminary hearing to have the board make a decision.

Parties can expect appeal hearings consistent with administrative tribunals across Alberta. Those familiar with the Municipal Government Board will probably see many similarities. Operationally, the NHBPB is administered alongside the Municipal Government Board as a results-based budgeting initiative. The NHBPB can issue written decisions, or oral reasons with written orders. Appeals are to the Court of Queen's Bench.

The New Home Buyer Protection Office's website is located at [homewarranty.alberta.ca](http://homewarranty.alberta.ca).

The NHBPB's website is located at [nhbpb.ca](http://nhbpb.ca).



Alexander Witt (University of Alberta, Class of 2010) is the New Home Buyer Protection Board's first case manager.

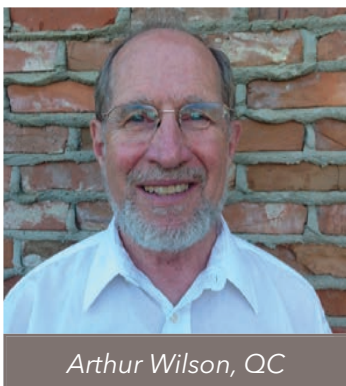


## Mentoring the Next Generation of Lawyers: Arthur Wilson, QC and Michael Birnbaum

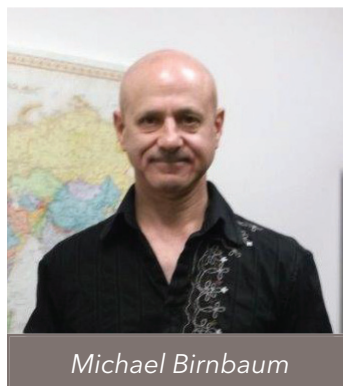
By Ola Malik

We are delighted to introduce you to Arthur Wilson, QC and Michael Birnbaum.

The CBA has a mentorship program for law students who are members of our Province's law school student sections. Mentors are paired with students based on the students' areas of interests. The mentorship commitment runs for one year, beginning with a "meet your mentor" reception. Mentors assist students in any number of areas which include networking, answering questions related to job searches, and providing insights into what various practice areas look like.



Arthur Wilson, QC



Michael Birnbaum

And who are our CBA student mentors? Arthur serves as a CBA mentor for students at the U of A while Michael is a mentor for U of C students.

Many of you will have met Arthur at some point in your career especially if you have any involvement with the CBA. Arthur has served in some capacity or another as section chair, member of various committees, or in some other volunteer capacity with the CBA since 1993. That's more than 20 years of volunteer involvement!!! He is dedicated to the integrity of our profession, in seeing our young lawyers succeed, and articulating a very clear vision for our profession: that we should be proud of who we are and that the legal profession is, and should be, a noble one.

Arthur started his legal career in 1979, and spent the next 30 years with various firms with a general litigation practice. In 2009, he was appointed as a Justice of the Peace in Edmonton. For those of you who might know Arthur, you would certainly agree with me that Arthur is a true gentleman, someone who respects and understands the litigator's craft and whose professional life has been dedicated to serving the needs of others in our profession.

Michael is a renaissance man. He speaks French, Hebrew, Spanish and enough Cantonese to order dumplings. Amongst his passions, he plays tenor saxophone with the Woodhouse Big Band, has acted in countless plays, and is a karate black belt. Clearly, not a man to be trifled with.

As many of you know, Michael has dedicated his professional life to using his legal skills in helping others. Since 2006, Michael has served as a Q.B. domestic resolution officer, and, amongst his long list of volunteer accomplishments, has served

*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.*

as a member of the Calgary Regional Committee for the Legal Aid Society of Alberta, volunteered with the Temple B'Nai Tikvah Community Outreach Program at the Calgary Drop-in Centre, volunteered with the children's Law Day program, served on the Board of Directors for the Jewish Family Service, Calgary Latin American Literacy Project, Calgary Immigrant Aid Society, and lectured to various organizations including the Elizabeth Fry Society and the Community Interpreters Course.

The CBA's strength and vibrancy reside in its extraordinary members. Arthur and Michael exemplify the commitment that many of our CBA members have made to helping others. They make our profession proud because their commitment to help isn't driven by the recognition that might bring, but because it is simply who they are, deeply committed to using their skills and status within our society to further a better life for others.

We celebrate their achievements - Arthur and Michael are "unsung heroes" -- and they represent some of

the finest qualities of our profession. 🌟

If you are interested in participating in the CBA mentor program either as a Mentor, or a student Mentee, please contact Linda Chapman (Calgary) at 403-263-3707 or Heather Walsh (Edmonton) at 780-428-1230 for more information.

### 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](mailto: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.



Ola Malik is a Municipal Prosecutor with the City of Calgary, a Canadian Bar Association Partner Organization. He is the chair of the Alberta Branch Access to Justice Committee, and a long-time Law Matters contributor with the "Unsung Hero" column.



## Regulation of Federal Freight Railways

By Sylvie Lang

Over the past year, both the tragedy at Lac Mégantic and concerns surrounding the transportation of western grain have led to a renewed focus on and review of the regulatory regime under which Canadian railways operate. It is a particularly appropriate time for an overview of some existing and proposed economic and safety regulations for the transportation of freight by rail in Canada.

### Economic Regulations:

#### **Common Carrier Obligations and Third Party Liability Insurance Coverage**

In both Canada and the US, railways must handle all traffic, including dangerous commodities, that is offered to them under legislative common carrier obligations. A railway does not have the ability to refuse to provide transportation services because it is inconvenient or unprofitable.

In Canada, a federal railway must meet certain third party liability insurance coverage requirements before it can be issued a certificate of fitness by the Canadian Transportation Agency (CTA). In August 2013 the CTA undertook a public review of its regulatory insurance requirements through consultation with various stakeholders: railway companies, railway associations, shippers, shipper associations, provincial and municipal governments and insurance bodies. Overall, three key questions have come to the forefront: (i) should there be regulatory minimum insurance requirements; (ii) should there be different requirements for the transportation of certain commodities; (iii) should risk be shared between railways, shippers and other parties, for example through a fund.

#### **Regulated Service Level Agreements**

Federal railway companies are required to offer a service agreement within 30 days after the day on which it receives the request from a shipper. If the shipper and the rail carrier cannot reach an agreement through commercial negotiations, shippers have access to a binding arbitration process to establish the terms and conditions of the confidential service agreement.

#### **Regulated Interswitching**

Interswitching involves the switching of cars from one federally regulated railway to another which will provide the "line-haul" or main movement of the rail cars. Shippers who are served by only one railway may transfer their traffic to another railway at a regulated rate as set by the CTA. Interswitching rights previously applied if the shipper's facility was within a 30 kilometer radius from where the two railways connected, however new legislation came into force on May 29, 2014 which extends interswitching limits in Saskatchewan, Alberta and Manitoba to a 160 kilometer radius. The legislation is intended to improve the speed at which grain gets to its destination.

#### **Maximum Grain Revenue Entitlement**

There is a statutory limit on the amount of revenue a federally

regulated railway may earn from the transportation of grain in Western Canada. The maximum revenue entitlement is established each year based on inflation, actual tonnage moved by each railway and the corresponding actual average length of the haul.

#### **Final Offer Arbitration**

Final Offer Arbitration (FOA) allows shippers to apply to the CTA for the settlement of disputes with rail carriers regarding rates or service. Arbitrators are independent of the CTA however an arbitrator's decision is enforceable as if it were a CTA order. The FOA process is confidential and expedited. An arbitrator or panel of three arbitrators must decide between the shipper and carrier's final offer, but unless captive, the shipper may always decide not to ship with the rail carrier if the outcome of the FOA is unsuitable for it. The arbitrator's decision will remain in effect for one year retroactive to the date of the shipper's initial submission to the CTA.

#### **Railway Safety:**

##### **Grade Crossing Regulations**

In February 2014 Transport Canada proposed grade (or level) crossing regulations. The goal of the proposed regulations is threefold: (i) create enforceable safety standards for federal grade crossings, similar to those for other railway and road infrastructure; (ii) create clear roles and responsibilities for railways, road authorities and private authorities to remedy multi-jurisdictional issues; and (iii) improve safety features such as unattended rail cars and sightlines.

##### **Fines for Violations of the Railway Safety Act**

This May the federal government proposed new Railway Safety Administrative Monetary Penalties Regulations which would give the Minister of Transport enforcement powers by creating fines up to \$250,000.00 for companies and \$50,000.00 for individuals that violate the Railway Safety Act. The amount of fines levied would be based on the severity of the violations. 📍



Sylvie Lang is one of the Legal Counsel at Canadian Pacific Railway Ltd. and is a graduate of McGill Law School.

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## Pipelines

# Who's looking out for Canada's public interest?

By Barry Robinson

Politics aside, the National Energy Board's mandate with respect to pipelines is really quite simple: Regulate in the public interest.

In a 2006 ruling on the Emera Brunswick pipeline, the Board characterized the public interest test as including "the interest of all Canadians," and referred to "a balance of economic, environmental, and social interests that change as society's values and preferences change over time."

Unfortunately, changes to the Board's regulatory framework – in the 2012 omnibus *Jobs, Growth and Long-term Prosperity Act* – have since reduced the Board's ability to adequately consider and protect the public interest in the face of a federal government determined to establish Canada as an energy superpower.

Supporters of Enbridge's Northern Gateway pipeline clearly believe that the project is in the public interest. In his opening remarks to the Joint Review Panel in September 2012, Northern Gateway president John Carruthers went so far as to compare the project to the Canadian Pacific Railway or St. Lawrence Seaway. Joe Oliver, formerly Canada's National Resources Minister, characterised the pipeline as nation-building, "fundamental to Canada's national interest."

And yet, Northern Gateway continued to face an unprecedented groundswell of opposition. More than 9,000 people wrote letters of comment to the Joint Review Panel for Northern Gateway. More than 4,400 registered to make a 10-minute oral statement to the Panel, although in the end, only 1,179 exercised that right. More than 200 registered as intervenors in the hearings.

All this was apparently too much public participation for Oliver's comfort. On the eve of the Northern Gateway hearings in January 2012, Oliver issued his infamous open letter, claiming that foreign-funded, radical environmental groups threatened to "hijack [the] regulatory system."

These fears, of course, were unfounded. Of the 220 registered intervenors, the only identifiable foreign organizations were 11 foreign-owned oil companies.

The spectre of foreign-funded radicals hijacking Canadian regulatory hearings gave the federal government political cover to repeal the *Canadian Environmental Assessment Act* and make dramatic changes to the *National Energy Board Act* in the spring of 2012. Compressed timelines and limited public participation became the new norm – all in the name of a supposedly more effective pipeline regulatory process.

But how effective is a truncated review period that fails to fully consider the concerns of the Canadian public? Not very, if review hearings for another major pipeline project – Kinder Morgan's proposed Trans Mountain expansion – are any indication.

The compressed regulatory timeline – restricted to mere 15 months – has already created its own set of problems. In an effort to expedite the hearings, not only did the Board completely

do away with oral cross-examinations, stripping away the most effective way to test evidence, intervenors were only given 40 days to review the more than 15,000 pages of Kinder Morgan's application and prepare initial written information requests. When you consider that oral cross-examinations were permitted during the project's toll application hearings, where only commercial interests are at stake and residents who lived along the pipeline route were denied the right to participate, these attempts to streamline the process seem especially unreasonable.

Then there's the matter of who is allowed to participate. In April of this year, the Board limited the participation of 1,250 Canadians to writing letters of comment and outright rejected another 468 applicants from participating at all – a move that's already triggered a legal challenge.

Therein lies the great irony of the federal government's attempts to streamline its regulatory process. As we've already seen, where reviews exclude Canadians from expressing an opinion or where timelines are so compressed that procedural fairness is impossible, legal actions are inevitable and will ultimately further delay the regulatory process.

The Board has said that the Canadian public interest includes values and preferences that change over time. And if public opinion on Northern Gateway and the Trans Mountain expansion are any indication, Canadians' values are clearly shifting.

As a result of high-profile disasters like the BP blowout in the Gulf of Mexico, Enbridge's Kalamazoo River spill and the Lac Mégantic rail tragedy, Canadians have a heightened awareness of the risks associated with the transport of oil products whether by pipeline, rail or ship. Canadians also increasingly see the link between expanding oil sands production from the current 2 million barrels per day to 6 million barrels per day and global climate change. And more and more Canadians recognize that increased oil sands production is driving demand for bigger, riskier pipelines to get oil to offshore markets.

Rather than recognize these shifting values, the federal government has changed policy to suit industry needs. In doing so, it has undermined the National Energy Board's ability regulate in the public interest, and destroyed its credibility with a Canadian public reluctant to give these major pipeline projects any social licence. 🇨🇦

*Barry Robinson is a staff lawyer with Ecojustice Canada. The opinions expressed in this article are his own and do not necessarily reflect the opinions of Ecojustice Canada or any clients.*



*Barry Robinson has been a staff lawyer with Ecojustice Canada since 2008. Prior to his law career, Barry worked in the forest industry and as an environmental consultant.*

## Pipelines

### Who's looking out for Canada's public interest?

By Richard A. Neufeld, QC

Barry Robinson's discussion of legislative reforms undertaken in 2012 raises important questions. Whether acting for pipeline proponents, or pipeline opponents, Canadian lawyers need to be mindful of the value of fair, efficient and comprehensive environmental assessment and regulatory reviews. Administrative tribunals have a critical role in ensuring that policy decisions are properly informed. They also can, and should, provide affordable access to justice for those who stand to be directly affected by a project. The Joint Review Panel tasked with considering the Northern Gateway pipeline project accomplished those goals, albeit over a time period that many thought to be too long.

One of the reasons for the length of the Northern Gateway hearing was a very successful ENGO campaign to inundate the Joint Review Panel with requests to present oral comments - the "Mob the Mic" campaign. As noted by Mr. Robinson, "only" 1179 people exercised that right, but the Panel was compelled to allot time to all 4400 who registered.

While not in time to affect the Northern Gateway process, the 2012 amendments to the *National Energy Board Act*, and the *Canadian Environmental Assessment Act* were designed to provide a measure of certainty of review timelines. Today, the NEB is required to complete its review of a pipeline application within 15 months of receipt of a completed application. This compares to the 30 months or so that it took to review and

report on the Northern Gateway application.

Did Parliament go too far in restricting opportunities for public participation in pipeline hearings? Perhaps. But rather than looking to cast blame on politicians, or for that matter those who turned past opportunities to participate into a campaign of delay, we should be examining better mechanisms to meet the legitimate expectations of everyone involved. There are many models available, including expanded use of workshops for discussion of complex technical issues, presentation of concurrent expert evidence ("hot tubbing") and increased use of mediation.

If the Bar really wants government to respect and empower administrative tribunals, it needs to do likewise. As lawyers, we need to work together to improve the manner in which administrative tribunals function, and to encourage our clients to participate in a constructive and respectful manner. Working cooperatively to make administrative hearings more efficient is the best way to protect against statutorily-imposed timelines and restrictions on participation. ☺



*Richard (Rick) A. Neufeld, QC is a Partner with Dentons Canada LLP in Calgary, a Canadian Bar Association Partner Firm. He is regularly named one of Canada's leading lawyers in the areas of environmental, regulatory and aboriginal law.*

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## Recent Developments under the *Species at Risk Act*

By Marianne (Chuck) Davies

It seems that scarcely a month goes by that there isn't a major new legal development that will have a serious and enduring impact on the way Canadians do business. To some degree, this fluidity is either fuelled or tempered by the surrounding political environment, and by the interplay of the often-competing, but occasionally-overlapping, interests of industry, First Nations, environmental groups, government and others.

The federal *Species at Risk Act* ("SARA")<sup>1</sup> is an excellent case-in-point. While it seems straightforward: the SARA prohibits a person from killing, harming or harassing a listed species and conducting activities that may damage or destroy the residence or critical habitat of any listed species,<sup>2</sup> with the exception of aquatic species or a bird protected by the *Migratory Birds Convention Act, 1994*,<sup>3</sup> these prohibitions apply only to federal lands. Yet there are two mechanisms that provide the federal government with the authority to extend the application of the SARA to provincially owned lands. The potential for sustained tension between federal, provincial and local governments over the application of these mechanisms adds to both the fluidity and significance of this area of law.

The first such mechanism is attributable to the safety net provisions of the SARA. These provide that the Minister of Environment ("MOE") must recommend to the Governor in Council that certain prohibitions under the SARA apply to provincially-owned lands if, after consulting with the appropriate provincial or territorial minister, the MOE forms the opinion that the residences or critical habitat of a listed species are not effectively protected by provincial or territorial laws or under an Act of Parliament.<sup>4</sup> The Governor in Council, in its discretion, may thereafter issue such an order.<sup>5</sup>

The second such mechanism is attributable to the emergency order provision, which provides that the competent minister<sup>6</sup> must recommend to the Governor in Council that it make an emergency order to protect a listed species if the competent minister is of the opinion that there are imminent threats to the survival or recovery of the species.<sup>7</sup> Consultation with provincial or territorial ministers is not required. The Governor in Council, in its discretion, may thereafter issue the emergency order to provide for the protection of a listed species on certain lands, which can include provincially owned lands.<sup>8</sup>

<sup>1</sup> SC 2002, c 29.

<sup>2</sup> SARA, ss 32(1), 33, 58 and 61.

<sup>3</sup> SC 1994, c 22.

<sup>4</sup> SARA, ss 34(3) and 61(4).

<sup>5</sup> SARA, ss 34(2) and 61(2).

<sup>6</sup> "Competent minister" is defined in section 2 of the SARA as: (a) the Minister responsible for the Parks Canada Agency with respect to individuals in or on federal lands administered by that Agency; (b) the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a); and (c) the Minister of the Environment with respect to all other individuals.

<sup>7</sup> SARA, s 80(2).

On December 4, 2013, the Governor in Council published the first emergency order ("Order") under the SARA.<sup>9</sup> Not surprisingly, it also attracted the first legal challenge against the emergency power. The Order, aimed at protecting the greater sage grouse and which prohibits certain listed activities on designated lands, took effect in March 2014 and covers nearly 1,700 square kilometres of provincial and federal lands in southwestern Saskatchewan and southeastern Alberta. An application for judicial review ("Application") challenging the constitutional validity of the relevant provisions of the SARA and the Order itself was filed with the Federal Court in January of 2014 by the City of Medicine Hat and LGX Oil + Gas Inc. (a junior oil and natural gas company). A motion for an order dismissing certain aspects of the Application is scheduled for mid-July of 2014.

In recent years, SARA issues have been in the forefront for government, industry, First Nations and environmental groups, among others. SARA is a legal meeting ground for a diverse range of significant political, economic and social interests. In the past year, and in addition to the issuance of the Order, recent developments under the SARA have included the issuance of two decisions out of the Federal Courts in which the Court found the behavior of the ministers under the SARA to warrant direction or declaratory relief from the Court,<sup>10</sup> the recommendation by the MOE that the status of the humpback whale (North Pacific population) be changed from a threatened species to one of special concern, meaning the general prohibitions under the SARA would no longer apply<sup>11</sup> and the Governor in Council's issuance of an order directing the National Energy Board to issue Certificates of Public Convenience and Necessity for the Northern Gateway Pipeline Project notwithstanding that "the Project is likely to cause significant adverse environmental effects...for certain populations of woodland caribou and grizzly bear" but that such "significant adverse environmental effects...are justified in the circumstances".<sup>12</sup>

Although the impact of the Order appears to be limited primarily to the development of new oil wells in the designated area of southwestern Saskatchewan and southeastern Alberta, its issuance in the face of the current attention being paid to species at risk and the SARA, generally, is significant. If the issuance of the Order is indicative of the federal government's inclination to issue emergency orders in respect of species at risk, any future

<sup>8</sup> SARA, s 80(1).

<sup>9</sup> *Emergency Order for the Protection of the Greater Sage Grouse*, SOR/2013-202, available online at: <http://www.sararegistry.gc.ca/default.asp?lang=En&n=F25868B7-1>.

<sup>10</sup> *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 and *Alberta Wilderness Association et al v Attorney General of Canada et al*, 2013 FCA 190.

<sup>11</sup> Order Amending Schedule 1 to the Species at Risk Act (2004) C Gaz I, 970 (Ottawa, Saturday, April 19, 2014).

<sup>12</sup> *Order directing the National Energy Board to issue Certificates of Public Convenience and Necessity OC-060 and OC-061 to Northern Gateway Pipelines Inc.*, PC 2014-0809.

## RECENT SUBMISSIONS AND INTERVENTIONS

The CBA's Legislation and Law Reform team has had a busy spring, including an intervention at the Supreme Court on Proceeds of Crime legislation, several appearances before Commons and Senate Committees, and submissions on proposed changes to the *Canada Business Corporations Act*, among others, including:

- Money-Laundering
- Strengthening the *Citizenship Act*
- Mandatory reporting standards
- Geographic price discrimination
- *Canada Business Corporations Act* consultation closed
- Bill C-13, *Protecting Canadians from Online Crime Act*
- In the Interests of Children: Response to Bill C-560
- Bill C-31

To read more about these, and other advocacy efforts, go to <http://www.cba.org/CBA/newsletters-eneews/2014-articles/06-stepsin.aspx>.

## CBA LEGAL CONFERENCE: ST. JOHN'S, NEWFOUNDLAND

Come learn, network and gain perspective about the legal landscape at the 2014 CBA Legal Conference - Converging Futures in St. John's, Newfoundland and Labrador, August 15 - 17. This year's conference offers unique and purposeful networking events like:

- **Opening Night Reception:** Start the conversation, and network at this tailgate-style event;
- **At-Home Dinners:** Connect with like-minded professionals at a local colleague's home for a meal and Newfoundland hospitality at its best;
- **CLC Kitchen Party:** Enjoy headline entertainment at an East Coast Kitchen Party, featuring the music of Newfoundland's own Alan Doyle of Great Big Sea;
- **Lunches and Receptions:** Discuss national perspectives on relevant issues with people in similar practice or interest areas.

For more information, or to register, visit <http://www.cba.org/cba/cbaclc2014/main/default.aspx>.

...Continued from Page 12

orders issued could have far more significant implications for energy projects that fall within the scope of such an order. For example, while the MOE has previously considered whether to issue an emergency order in relation to woodland caribou and, at least twice,<sup>13</sup> formed the opinion that there was no imminent threat to the recovery of the woodland caribou, if the issuance of the Order is indicative of a trend in that direction, such an order in relation to woodland caribou could have significant impacts on resource developers with operations on provincial Crown lands in northern Alberta, an area where significant woodland caribou critical habitat has been identified.

<sup>13</sup> Once in March of 2011, which decision was the subject of a successful challenge and was set aside by the Federal Court in *Adam et al v Minister of the Environment et al*, 2011 FC 962 and, subsequently, in January of 2012, which was the subject of a second judicial review application that was ultimately discontinued by the applicants.

## END-OF-LIFE WORKING GROUP

End-of-life decisions, and the when, and the how, and the legality of making them, have resurfaced in the *zeitgeist* with the passage of a law in Quebec and the Supreme Court's decision to revisit its 20-year-old Rodriguez decision. In the wake of a panel discussion at the 2014 Mid-Winter Meeting, the CBA has established an end-of-life working group, which wants to know where you think the CBA should stand on the issue.

For more information, and to submit your response, go to <http://www.cba.org/CBA/newsletters-eneews/2014-articles/06-questions.aspx>.

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For more information on LexisNexis, or any other CBA Preferred Supplier, visit <http://www.cbamembership.org/Member-Savings.aspx?lang=EN>

The importance of these developments will only increase in the coming years, as more legal challenges work their way through the courts, more political pressure is applied by all sides, and as federal and provincial governments continue their never-ending dance of "occupying the field" while disagreeing as to whose field it is. The only real certainty is that we are in for a period of uncertainty, which is precisely why it is a fascinating time to be a regulatory lawyer, working at the crossroads where so many legal and economic interests intersect. 



Marianne (Chuck) Davies is Senior Legal Counsel - Regulatory for Nexen Energy ULC, with an interest in Species at Risk Act issues.



# FRONT AND CENTRE

## Chair Appreciation Dinners



Section Chairs, Council and Executive Members met in Calgary (l) on June 16, and in Edmonton (r) on June 23 for the annual Chair Appreciation Dinners. Our thanks go out to all of our indispensable volunteers who donate their time throughout the year.

## Inns of Court - Spring 2014



(l to r) The Hon. Mr. Justice T.D. Clackson, Frank Friesacher, The Hon. Madam Justice D.L. Shelley, Karen Hewitt, Shaina Leonard, Robert M. Curtis, QC

## Law & Literature Dinner



Criminal Justice "Law & Literature" Dinner Hosts  
(l to r) The Hon. Mr. Justice Jack Watson, Karen Hewitt, Brian Vail, QC

## Players de Novo present *The Matchmaker*



Watch for a full review of *The Matchmaker* in the Fall edition of *Law Matters*!

Front Row (l to r): Deborah Alford, Jillian Gamez, Carrie Sharpe, Terry Hodgkinson, Stacey Grubb, Marissa Tordoff, Anne Ferguson Switzer, Elizabeth Johnson. Back Row (l to r): Kerry Hart, Chris Luchak, Darcy DePoe, Don MacCanell, Paul Govenlock, Mark Facundo, Andrew Hladyshvsky, Stephen Hillier, Ed Picard, Paul Solotki



# CHOOSE FROM CANADA'S TOP MEDIATORS AND ARBITRATORS

## South Civil Litigation Section



*The Hon. Jonathan Denis, QC, presents to the South Civil Litigation Section on priorities and challenges for the Civil Justice System - June 23, 2014*

## Administrative Law National Panel



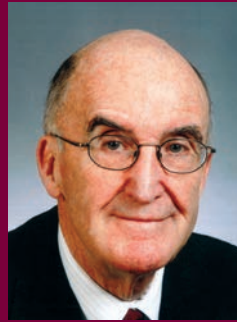
*(l to r) Glenn Solomon, QC, Sherri Walsh, Karen Sinclair-Santos, QC, Alison Sabo, Fred Kozak, QC, Fiona Vance, Will Randall, Moin Yahya, Arman Chak*

## North Family Law Section Social



*(l to r) The Hon. Judge W.S. Andrew, The Hon. Madam Justice D.C. Read, Micia Kawulka, The Hon. Judge P.E. Kvill, The Hon. Madam Justice D.A. Yungwirth*

## Alberta Panel



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.



**ADR**  
CHAMBERS

# ALBERTA BRANCH NEWS

## MEMBERSHIP RENEWAL & SECTION REGISTRATION

Effective this year, all CBA members have been moved to a membership renewal date of September 1. Unless you have chosen to pay through to August 31, 2015, members will have received a renewal notice in the mail from the National office.

New this year, members can renew their memberships online at [www.cbamembership.org](http://www.cbamembership.org) without having their hard-copy renewal notice; all you will need is your CBA membership number. Membership renewals are due no later than October 31; after that date, your membership will lapse. When registering online, you can also take the opportunity to purchase your Portfolio and Portfolio Plus packages, which give you access to education credits, rebates on eligible CBA purchases, and more.

Starting on August 20, section registration will also be open. Members will receive notification of section registration being available via email, and through the email newsletter. If you plan on purchasing a Portfolio or Portfolio Plus package, and would like to use your education credits towards the cost of sections, be sure to do so PRIOR TO registering for your chosen sections, as the credits cannot be applied after the fact.

For any questions regarding membership or section registration, please contact Linda Chapman at 403-218-4313 in Calgary, or Heather Walsh at 780-428-1230 in Edmonton.

## NEW CALGARY OFFICE LOCATION

The Calgary office is now located at **710, 777 - 8 Avenue SW, Calgary, AB T2P 3R5**. We ask all members attending section meetings in Calgary in September to make a note of the new address - we would hate for anyone to miss a meeting!

We look forward to hosting our members at the new space when meetings resume in the fall.

## CBA ALBERTA LEGAL DIRECTORIES

By now, all members will have received the Legal Directory package in the mail with early bird order form, advertising information, and enhanced listing/preferred area of practice information. The early bird deadline for ordering hard copy Legal Directories is August 28 - don't miss your chance to save \$5 off of the cost of a printed directory, or \$7 off of the cost of the printed/online directory combo.

All members who purchase Portfolio and Portfolio Plus packages will be eligible for a complimentary copy of the printed directory, and complimentary access to the online directory.

The printed directories are scheduled to be delivered in September. For any questions, please contact Lee-Anne Wright at 403-218-4310.

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## The New Smoking?

By Devin Mylrea

In this modern age, the list of hazards we may encounter in our daily lives seems endless. That list appears to be added to at an almost exponential pace.

Smoking, once ubiquitous, is a confirmed health hazard, some would say universally. Not a surprise to most today, it is linked to many dangerous conditions and illnesses and is a habit now much scorned. Imagine working in an office where many employees smoke all day every day of the work week? Can there be any hazard in the office setting today like smoking?

Indeed there can. It's called sitting.

In a study conducted over 12 years in relation to just over 12,000 Canadians a stark conclusion was reached: "...there was a progressively higher risk of mortality across higher levels of sitting time from all causes". Translated: the longer you sit without movement, the more danger to your health, according to the study.

And so sitting has become the new "smoking" according to some headlines in *Runner's World*, *The Globe and Mail* and CBC (to name a few) on recent results of controlled studies on reducing sitting times at work. One such study is published in the *American Journal of Preventive Medicine* made analysis of the results of providing some test subjects with height adjustable desks, others with height adjustable desks and other tools to assist in encouraging reducing sitting and still others with nothing.

The best results in reducing sitting at work were achieved with those who were given not just height adjustable desks but other tools, exercises and encouragement. Another surprising tool, peer support.

Subjects more readily would commit and perform the exercises and functions of sitting then standing then doing some other task if others were doing it as well. Why? Because people were self conscious about standing while others sat, sitting while others stood or stretching while others walked and so on.

The major takeaways from the Canadian study of 12,000 and the other study with height adjustable desks? Movement in an otherwise sedentary day is critical to maintaining health, and you don't need expensive equipment to accommodate rapid and meaningful change. How? Sit less!

- Get up to walk to see the lawyer one floor up.
- Walk to meet your client.
- Take 10 minutes out of every hour to stand and stretch while reading emails, prioritizing your task list or updating your business development schedule.
- Arrange for a portion of your work to be completed standing, like document reading on a raised monitor.

- Sit in a comfy chair for a read and then get up and stand or walk while dictating a memo or correspondence.
- Take your conference calls standing at your desk.
- Sit for typing, stand for phone calls, walk to talk.
- If you have a height adjustable desk - don't forget to sit down!! It is surprising how easy it is to stand and not remember that the variety of movement is what makes less sitting really work.
- Support a dynamic work environment that embrace a reduction in sedentary habits.

Our bodies are designed to move but no single piece of furniture can address the need for dynamic movement and re-positioning in the day. A variety of simple choices and movements in the day are what lead to less sitting.

And, apparently, a longer life. 🌐



Devin Mylrea is an Associate Partner with Shea Nerland Calnan LLP in Calgary. His firm utilizes many of the technologies and methods in this article.

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## A Look Ahead to Fall 2014

By Jennifer Flynn

Unless you are my 11 year old son - who managed to break his arm the moment school let out - summertime is a time for Albertans to get outside, enjoy the nice weather, and try out some of the great recreational activities that our province has to offer.

For those of us at LESA, summer also presents an opportunity to plan our programs for the upcoming educational year. Our complete 2014/2015 educational calendar is now available online at [www.lesa.org](http://www.lesa.org). Use this calendar to plan your continuing professional development for the upcoming educational year.

We are offering a wide range of programs between September and December 2014, including:

- **4th Annual Law and Practice Update** (Calgary) - A two-day conference designed to provide general practitioners and those practicing in smaller firms with an update in a full spectrum of substantive and practice management topics.
- **Bare Land Condos** - Examine recent and proposed changes to the Condominium Property Act and ongoing issues in conveyancing bare land condos.
- **Child Support** - Explore income determination, the impact of custody arrangements, s. 7 expenses, and the child support guidelines.
- **Constitutional Law Symposium** (Edmonton) - An update and analysis on recent Supreme Court of Canada constitutional decisions and their impact, as well as upcoming developments.
- **Evidence Law Refresher** - Review the law of evidence, including key evidentiary principles, objections, techniques, and strategy.
- **Fundamentals of Judicial Review** - Walk through a judicial review application from the beginning, including types of decisions that can be reviewed, limitation periods, levels of court, the record, and the role of the tribunal.
- **High Conflict Personalities** - A must-attend program for lawyers who work with high emotion and high conflict litigants.
- **Junior Solicitor Business Law Basics** - An overview of tax, drafting contracts, license agreements, IP Law, technology and maintenance agreements, corporate structures, minutes and resolutions, employment and labour, and WCB.
- **Law Office Technology** - Best practices and software for law office accounting, legal case management, electronic filing, and document organization.
- **Pensions** - Review the new legislation including valuation of pensions on marriage breakdown, review of an actuarial report, how values are determined and how they can be challenged.
- **Written Advocacy: Preparing Persuasive Documents** - Learn to construct persuasive briefs and factums.

Specifically designed for legal support staff, look for:

- **AGTA Applications for Legal Support Staff** - Review the forms, common applications, and walk through the Act and regulations.
- **Collections for Legal Support Staff** - Review debt collection and how to enforce your judgment in a foreign jurisdiction.
- **Court of Appeal Procedures for Legal Support Staff** - An introduction of the new Court of Appeal rules and a review of procedure.

Our capstone event is the 48th Annual Refresher running April 19 to 21, 2015 in beautiful Lake Louise. This year's focus is Wills & Estates. Register early to reserve your spot!

So while the days are long, the sun is shining, and many of us are in vacation mode, you can still get a head start on your own back-to-school planning. For the most up-to-date information on our live events, educational resources, pre-call admission training, and volunteer opportunities, please visit [www.lesa.org](http://www.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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## Pro Bono Opportunities for Alberta Lawyers

Pro Bono Law Alberta (PBLA) celebrated its 7th year of creating and providing pro bono opportunities for Alberta lawyers at its annual general meeting on June 19, 2014. The program included highlights of our year's activities, keynote message by Master J.B. Hanebury and a client testimonial from a young woman who has benefitted from legal advice provided through a partnership brokered by PBLA between Discovery House Family Violence Prevention Society and WK Family Law Lawyers. PBLA also presented Norton Rose Fulbright LLP with the 2014 Pro Bono Leader in Community Award for its ongoing involvement in our court-based programs and the Legal Grounds Advice Clinic.

The annual celebration capped a busy year of administering projects that provide lawyers with meaningful volunteer opportunities which allow them to use their unique skills to enhance access to justice for Albertans. Although it is now summer and many lawyers are away enjoying a well-deserved break, the need for access to legal services continues regardless of the season. PBLA has several options for lawyers who want to give back to their communities by volunteering in a legal capacity. We continue to administer several projects and programs during the summer months including the Civil Claims Duty Counsel (CCDC) program, Queen's Bench (QB) Amicus program, Volunteer Lawyer Services (VLS) program and several other initiatives.

### Civil Claims Duty Counsel - Edmonton and Calgary

CCDC is a joint initiative with Pro Bono Students Canada (PBSC) and several firms in Calgary and Edmonton. People with legal matters in provincial court can obtain assistance with summary legal advice, forms completion, procedural information and court appearances. Law students benefit from real life court experience and lawyers have the opportunity to step outside their comfort zone and try something new in areas of law they might not have been involved in before.

In 2013, almost 2000 clinic hours were provided to 2432 Albertans by 349 volunteer lawyers and a total of 88 students were involved in Calgary and Edmonton. In the first quarter of 2014, an additional 303 Albertans received assistance through this program in Edmonton alone. As of PBLA's fiscal year end March 31, 2014, there are 360 lawyers on the CCDC volunteer list (216 in Calgary, 133 in Edmonton).

### QB Amicus Program

Through the QB Amicus Program self-represented litigants (SRLs) appearing in Queen's Bench Justice and Masters Chambers receive much needed legal assistance. Volunteer lawyers act as amicus curiae and help the Court understand the issues raised and the positions taken by SRLs. The project also includes a "storefront" office where individuals can receive summary legal advice regarding their Chambers application, in a manner similar to our Civil Claims Duty Counsel program.

This program, which began as a pilot in October 2013, has helped over 500 people and now involves 10 firms and 166 volunteers including lawyers and articling students who participate at shifts three days per week.

### PBLA welcomes Nonye Opara

Nonye Opara joined the PBLA team as Program Assistant in June

### By Gillian Marriott, QC and Kendal Moholitny

2014. Nonye is an internationally trained lawyer from Nigeria and LL.M. candidate at the University of Calgary's Faculty of Law. Nonye was an active volunteer for both the CCDC and QB Amicus projects this past year and will be primarily involved with supporting the administration of the Volunteer Lawyer Services program. To join the VLS roster call Nonye at 403-541-4803.


### National Pro Bono Conference, September 24 and 25, 2014

Join us at the upcoming National Pro Bono Conference in Regina SK. The two-day event will feature a Welcome Reception for all attendees, speakers, and special guests on the evening of Wednesday, September 24, 2014 prior to the Conference. The National Pro Bono Conference Banquet and Awards Ceremony will be held on the evening of September 25, 2014 at the Hotel Saskatchewan in Regina, Saskatchewan. The agenda, registration and information on the National Pro Bono Awards are available at [www.probonoconference.ca](http://www.probonoconference.ca). Deadline for Awards submissions is August 1, 2014.

### The Impact of Volunteers

Summertime, and the livin' is easy...but the need for pro bono legal service continues even during the holidays. Please consider adding pro bono service to your menu of volunteer choices and help make a difference in someone's life. One lawyer, through the partnership between Discovery House and WK Family Law Lawyers did just that – as described by a young woman from Discovery House:

*"For the first time in 10 years, I was able to take the power away from my ex. He couldn't scare or threaten me to agree with something he wanted. I am pleased to say that mediation was very successful. An agreement has been made between my ex and I regarding the disputes of ending our relationship. It's been made in such a way that my children and I benefit from it. So now I say thank you. On behalf of all the mothers from the Discovery House, thank you so much. Your time and knowledge has made all the difference, not just in my life but many others, as well. You've helped to ensure that an abused woman doesn't go back to an abused relationship because of a fear of the courts. A huge weight has been lifted off my shoulder and a new better life is on its way."*

Thank you to the many volunteers in Alberta who actively participate in offering their skills and expertise to improve access to justice. In our fiscal year 2013-2014, through the various programs and projects administered by PBLA, 723 volunteer lawyers and 109 law students were actively engaged in assisting approximately 3500 clients. We can't do this work without you. Thank you! 



Gillian Marriott, QC is a past president of the Canadian Bar Association, Alberta Branch. She is the Executive Director of PBLA, and practices family law with Widdowson Kachur Ostwald Menzies LLP.



Deputy Executive Director Kendall Moholitny joined the PBLA team in February 2013. Kendall articulated at Dunphy Best Bloksom several years ago and also practiced civil litigation at Peacock Linder Halt.

## North

My first year as a section coordinator closes with the summer break. A big thanks to Karen McDougall and to Heather Walsh for holding my hand through it, and more thanks to the 2013-14 chairs and executives of our 32 north sections for your volunteer efforts. The benefits of continuing education, networking, and social interaction you provide to our membership is invaluable and makes the CBA Alberta Branch the great organization it is. It was a pleasure getting to know many of you throughout the term.

We also welcome aboard several new executive members and chairs for the coming year, as some sections see the seeds of succession planning come to fruit. Karen and I held a workshop in May with the incoming as well as the outgoing executive, and have made efforts to streamline the process for planning and implementing the section meetings with easy-to-use forms. We also focused on ways to delegate, and how to get talented section members involved.

Some sections have already organized their September meeting so they can focus attention on World Cup soccer (which I am doing now...) or take summer vacation worry-free! We encourage members to register for their sections as soon as possible (once we "go live" in the third week of August with registration) so you don't miss out on any September section meetings. You will be notified by email and in the e-newsletter. If you have any ideas for meetings or topics, be sure to share them with your section chair for the coming year!

### By Frank Friesacher and Melissa McDougall

Looking forward, Associate Chief Justice J.D. Rooke will be speaking to the Junior Lawyers Section on September 8, 2014 to kick off their season, and we hope to get many new articling students and junior lawyers out for this!

Remember, the CBA Alberta website ([www.cba-alberta.org](http://www.cba-alberta.org)) is a great option for section members to review previous meetings which have been recorded and posted, along with PowerPoint presentations and handouts, to the section's page. We want many more members to access this resource (perhaps even on your iPad this summer on the beach or while camping!)

We wish you a great summer and look forward to another exciting CBA year! Stay cool! ☺



Frank Friesacher is a partner with McCuaig Desrochers LLP in Edmonton. He is an avid CBA member and volunteer, having previously served as Internet Advisor, Legislative Review Committee member, and more, in addition to acting as North Section Coordinator.



Karen McDougall is the principal of Casefinder, and is a long-time CBA member and volunteer, currently serving her third year as North Section Coordinator.

## South

The past year has demonstrated top quality section programming - the CBA at its best! We have seen original and creative topics, sections working together to co-present in areas of shared interest, and material that touches on areas of importance to practitioners. There have been a number of bench/bar sessions and roundtables which have facilitated frank discussion about the workings of our justice system, and presentations from experts, top practitioners, and others. Our season has ended with a number of social meetings to provide outstanding networking opportunities among members with shared section interests.

We are grateful to the section executive members for giving the CBA their time and attention - you have given the CBA and its members great value and we appreciate each of you!

For the year to come, new executives should now be in place, budgets set and your 2014-2015 programming should now be mapped out. We encourage chairs not to try to take on all of the work in your section executives, and for other executive members to step up and share tasks so that many hands can make light work. We held a Section Workshop on May 2, 2014 to try to help each of you get

### By Jenny McMordie and Anthony Strawson

started for the coming year. The next Section Workshop is planned for the spring. If you could not attend the last workshop and would like copies of the slides or other materials that were distributed, please speak with Linda Chapman.

As Jenny's term as South Section Co-ordinator comes to an end, we are delighted to welcome Kate Bilson in to this position. Anthony and Kate will be available for consultation, advice, brainstorming and troubleshooting, and look forward to supporting all of the section executives in their efforts to bring value to CBA members. ☺



Jenny McMordie practises civil litigation (commercial, estate and personal injury) and is a proud partner at a three-lawyer firm, West End Legal Centre. Jenny has participated in many CBA sections over the years, and values both the CLE and networking opportunities that the CBA sections offer.



Anthony Strawson is a partner with Felesky Flynn LLP, where his practice is restricted to taxation law. Anthony is a frequent speaker and writer on taxation matters.



## University of Alberta

Summer is underway, and school has been out for a few months. Articling students have had some practice at their firms at this point. As for summer students, they are almost done!


The transition from law school to firm life can be a daunting one. Suddenly, all of the work you do has some form of impact. You can no longer search Westlaw or Quicklaw endlessly! Of course, you also get a lot of guidance and mentorship, and everyone is invested in your education as an asset to the firm.

Students scattered across the country in various law firms will each have a different experience in terms of the size of the firm, the specifics of the city, and the focus of the firm. We will, however, all come out the other end having learned a lot about the profession and ourselves in the process.

Law school provides us with the tools to handle problems as they are handed down to us. We learn research skills, perseverance, and ethics. While law school and law firms may differ in terms of overall social experience, law firms do give students plenty of opportunity to socialize if students are willing. So take the opportunity to meet as many people as you can.

Some of us will be returning to school in a month and some of us will not. Having been a summer student can give returning students a bit of perspective on their years at school. That experience can impact many things like course selection and time management. The legal profession is so much more complex and nuanced than school can prepare you for, but the

**By Siwei Chen and Katherine Fraser**

challenge of the profession is why so many of us are here. Learn as much as you can and have fun doing it. 



Siwei Chen is the co-chair of the University of Alberta Law Students section. She is currently in her third year at the Faculty of Law, summering at Bennett Jones in Calgary.



Katherine Fraser is the outgoing co-chair of the University of Alberta Law Students section. She has just graduated from the Faculty of Law, and she will be clerking at the Provincial Court and finishing her articles at MLT, both in Edmonton.



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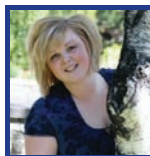
## University of Calgary

Eager to begin my career, I started articling at the beginning of June. Having spent my two previous summers with my firm I expected it would be business as usual, but I have to admit that it is taking me some time to get used to the difference between summer student and student-at-law. Perhaps the major difference is the amount of pressure I put on myself when it comes to my work. My responsibilities have expanded from those I held as a summer student and I expected I had all the necessary skills to attack them flawlessly. In reality, there are so many new things I am learning every day. For example, being directly responsible for a client's file is an aspect of the job that takes some getting used to. Balancing the amount of time I put into a file so I don't provide an under researched work product, while not taking too long so as to provide the client with an outrageous bill, takes some practice. It also takes some time to get used to the style of your principal.

My advice to any new articling students, both current and future, is to relax. Don't expect to know everything in your first week. Even though you have just finished three years of intense learning, some of the nuances you will learn will only come from the time you put in at work. Even though I left law school with a number of skills, there are many things I have to learn and/or change to fit the needs of my firm. Be open to those changes. While I will always be indebted to a number of amazing professors during my time at the University of Calgary my principal is the person who will truly shape the way I approach the practice of law and

**By Kathryn Kitchen and David Louie**

the skills I need to be a lawyer. Remember to cut yourself some slack and enjoy your articling year! 



Kathryn Kitchen is a co-chair of the University of Calgary Law Students section. After completing her third year at the Faculty of Law, she is articling at a general practice firm, Trobert Law, in Estevan, Saskatchewan.



David Louie is a co-chair of the University of Calgary Law Students section. After completing his third year at the Faculty of Law, he is articling at the labour and employment firm Roper Greyll LLP in Vancouver.



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## Reform Matters The Reform Days of Summer

By Peter Lown, QC

As I write this in early July, for release early in August, the blue skies tell me that there really is summer in Alberta.

So what does reform do in the months of July and August? These months are a break in our normal schedule; when we are not carrying on active consultation and do not normally plan Board meetings.

First, we have two significant events in July and August - the annual meetings of the Uniform Law Commission (ULC), [www.uniformlaws.org](http://www.uniformlaws.org), in the United States from July 11-16, and the annual meeting of the Uniform Law Conference of Canada (ULCC), [www.ulcc.ca](http://www.ulcc.ca), from August 9 to 14.

The ULC connection is important for the joint projects we approve - this year, Recognition of Substitute Decision-Making Documents, and Recognition of Canadian Domestic Violence Protection Orders. I also participate in the Scope and Program Committee which manages the agenda for the Commission. This exposure provides a meaningful insight into the issues which are emerging - from Family Arbitration to Fiduciary Access to Digital Assets. The two conferences have developed a very viable exchange of research and planning that helps to plan and manage the inventory of projects effectively.

The ULCC conference will meet for its 96th annual meeting in Toronto in August. Alberta delegates will be actively engaged in leading several projects including the *Interpretation Act*, the *Wills Act* and the policy on Access to Digital Assets, among others. ALRI is currently working on two major projects to adapt a uniform act to the Alberta context - the *Uniform Trustee Act* and the *Uniform Reviewable Transactions Act* replacing the *Trustee Act* and the *Fraudulent Preferences and Fraudulent Conveyances Acts*.

Summer is also the time when we prepare for the first stage of project selection in September. Each of the suggestions we have received during the year is researched to provide a thumbnail sketch of the issue that the topic raises. In addition, we prepare a "Law Reform Agencies Update" which summarizes the work of law reform commissions across the common-law world. This Update helps identify emerging topics, as well as indicating existing research which may assist if the project is approved. (You will see the references to the work of various law reform commissions in our forthcoming report on Oaths and Affirmations).

In the second quarter of this year Board agendas were extremely full, attempting to clear the decks before summer, and to allow preparation for consulting in the fall. We approved final reports on Oaths and Affirmations, and on part of the issue of Posthumous Assisted Reproduction. In this part we deal with the issue of parentage in the context of posthumous assisted reproduction, which was not dealt with in the recent amendments to the *Family Law Act*. In

preparation for a final report on a new *Trustee Act*, the Board will hold one more special meeting in early July to complete the remaining issues. We expect a final report by end of year. For fall consultation, policy direction has been given for reports for discussion on proposals for a new Non-Profit Statute, and for the Date of Valuation in Matrimonial Property Applications. Dealing with five major reports in a several month period is a tribute both to the ability of the Board and the excellent preparatory analytical work done by Counsel in anticipation of Board discussion.

The Final Report on Oaths and Affirmations will suggest amendments to the *Alberta Evidence Act* designed to avoid the inconsistencies of application of the current requirements. It will recommend replacing the current "object and justify" requirement with a "free choice" model. This change, along with simpler suggested wording, should avoid many of the current potential problems. Final Report 105 should arrive on your desk or in your inbox very shortly after Law Matters does.

So while I wish there were lazy hazy reform days of summer, there really aren't. We take a break from the sometimes grind of monthly daylong Board meetings, and replace it with other activity. Our two summer research students in Edmonton and Calgary bring a youthful breath of fresh air. Hopefully staff and counsel get something of a break and we will be refreshed, prepared and ready to consult on new topics in the fall. Thanks for all the work you put into assisting us in the reform process, and we look forward to reengaging you in mid-September. 🌐



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Peter Lown, QC is Director of the Alberta Law Reform Institute. He is a Professor Emeritus at the University of Alberta Faculty of Law and has been an active member of the Law Society of Alberta since 1973.

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## Roméo Dallaire on the Role of Peer Support

By John Gulak

Roméo Dallaire spoke to a Calgary audience of lawyers, judges, law students and other Assist supporters in early May. The humanitarian and retired Lieutenant-General of the Canadian Forces said peer support, along with medication and therapy, have been critical to allowing him to live with his post-traumatic stress disorder (PTSD). Dallaire was commander of the United Nations peacekeeping mission during the 1994 genocide in Rwanda.

Dallaire said we must do a better job of supporting one another in times of trouble - whether that's mental health issues for veterans after serving on the front lines of military conflict or lawyers on the front lines of legal conflict. Assist endeavours to support lawyers and law students with its Peer Support program. Established in 2010, the program has seen 46 matches of lawyers and law students with peer volunteers.

Support from a peer who "has been there" can have remarkable power. Sometimes it can be as simple as dispelling the notion that the struggling lawyer is alone with their problem or that they are the only one to have had this particular problem.

The fact that the peer is a volunteer can also be powerful. A peer volunteer acting with humanity and understanding offers a different kind of support from a paid professional. A peer more easily relates to the career stresses of another lawyer and has credibility. That the peer is volunteering their time also sends an important message that the struggling lawyer is worth another lawyer's time.

Asking for help is not second nature to most lawyers. Too many of us struggle to find the necessary humility to ask for help. On the other hand, offering to help others is second

nature to most of us. Indeed, the opportunity for service to others was often a significant factor in choosing to become a lawyer.

As with Roméo Dallaire's struggles with PTSD, those who serve - whether in the military or the legal profession - can sometimes suffer wounds that are not visible. Sadly, the invisibility of these wounds makes them tempting for the individual to ignore or stuff down. Their invisibility can also make it harder for people close by to see that the individual is in fact suffering from a real problem.

Roméo Dallaire has been a tireless and outspoken advocate for helping the general public better understand PTSD and veterans' mental health issues. As part of Assist's mission to help Alberta lawyers with personal issues, the Peer Support program seeks to prevent small problems from becoming larger issues that affect a lawyer's practice and personal life. Our peer volunteers promote this by providing support and resources and by encouraging lawyers to seek help early.

Dallaire spoke of the challenges of military service in changing and often ambiguous political conditions. He drew on his experience on the front lines in political and military conflicts and challenged his audience to be mindful of the stresses of being on the front lines of a legal system that is itself changing and sometimes ambiguous. 🌐



John Gulak is on the board of directors of Assist. He recently wrote a book, *Sick to Death of the Silence: Stories to break down the stigma of mental illness*, available for purchase online at [cmha.calgary.ab.ca](http://cmha.calgary.ab.ca)

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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.



## Children's Legal & Educational Resource Centre

By Sherry Wheeler



**CHILDREN'S LEGAL & EDUCATIONAL  
RESOURCE CENTRE**

Please consider volunteering with the Children's Legal and Educational Resource Centre, better known as CLERC.

Imagine you are a 15 year old teen and you just got your first summer job painting houses. The anticipation of that first paycheck abounds! You've worked for two long, hard weeks and pay day is finally here. At the end of the day on Friday you get your cheque. Off to the bank you go! It's a great weekend! Monday morning you show up for work. The doors are locked and no one is there. Your cell phone rings and it's the bank. The cheque bounced and now your bank is telling you that you owe them money. Confused and feeling hopeless, what do you do?

Young people face legal issues like this all the time. They don't have the knowledge or capacity to handle them alone. Some youth have guardians who can navigate these issues and advocate for them, but many don't. As a lawyer and a parent, you would know what to do to help your child. Most of the youth CLERC serves are marginalized and vulnerable. They have no one to help them and nowhere else to turn. There is no other government or non-profit program that offers this type of legal service to youth.

CLERC helps youth with a multitude of legal issues that include:

- Obtaining security deposits;
- Dealing with evictions and improper notice;
- Getting their last pay cheque or a uniform deposit;
- Being forced into an arranged marriage;
- Dealing with guardianship issues; and
- Obtaining independent student status;

We have been delivering legal services to children and youth since 2002. We deliver our services in person, over the phone, and through our website [www.youthlaw.ca](http://www.youthlaw.ca). The website allows young people to either research their issue on line through our Youth Law topics or through our "Ask a Lawyer" tab. Our legal team responds to the individual questions and either resolves the question or opens a file. We also reach out to youth through our Legal Outreach for Youth (LOFY) Legal Clinics that are held in schools and youth serving agencies.

How can you help? We have volunteer opportunities that include providing direct service to youth by taking on a CLERC youth (civil) file or perhaps you would like to develop a relationship with a school or agency and be our CLERC volunteer lawyer at a LOFY clinic.

You may or may not have experience with youth civil law matters but we do and we can share our knowledge with

you. We provide training and support. We ask that volunteer lawyers, who accept a file, see the matter to conclusion. This may include court applications, appearances, demand notices and negotiated settlements. This could be a short term commitment or one that lasts for months.

We are working on establishing more LOFY clinics, in addition to those offered at the Forest Lawn and Crescent Heights High Schools and The Alex Health Centre. All our clinics are held on regularly scheduled school days. Volunteer lawyers would need to be available during the day.

Additionally, opportunities for school presentations on youth rights and law issues are available for lawyers comfortable in a classroom setting.

Our Volunteer Lawyer Program is new and we are thrilled with the response thus far. We hope to begin assigning lawyers to youth files in the very near future and in the meantime, any lawyer wishing to obtain more information about the program can contact [sherry.wheeler@clerc-calgary.ca](mailto:sherry.wheeler@clerc-calgary.ca).



*Sherry Wheeler is the new Community Outreach and Volunteer Coordinator at CLERC. She was a founding member of CLERC and a Child and Youth Advocate, Southern Alberta from 1990 to 2006.*



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## Maclean (Mac) Everett Jones, QC

By Robert Harvie, QC

Maclean (Mac) Everett Jones, QC, passed away March 16, 2014 at age 96.

Mr. Jones was a legal pioneer in the Province of Alberta - after graduating law school at the age of 22, and becoming one of the youngest lawyers called to the Bar in the Commonwealth, he went on to become known as an industry leader in oil and gas law, and was the namesake of the venerable firm of Bennett Jones LLP, an international firm with almost 900 lawyers today.



him to a significant role in the development of Alberta's oil and gas industry. In 1947, Jones represented Imperial Oil during the initial development of the Leduc oil field. During that time, Mac Jones drafted the first oil contracts and set in motion the development of Alberta as we know it today. Mr. Jones remained with the same firm for over 70 years, the firm formally adopting his name when it became Bennett Jones in 1980.

In 1939, Jones was hired by former Prime Minister R.B. Bennett, and was called to the Alberta bar that following year in 1940. However, his career as a lawyer was put on hold when he left to serve in the Navy, participating in the Canadian effort in World War II until 1945.

After returning to Calgary in 1945, he returned to the law firm of Bennett, Hannah, Nolan Chambers & Might - and picked up his career where it had left off prior to the war, acquiring expertise in the area of oil and gas law, leading

In 1999, Mr. Jones received the Lifetime Achievement Award from the Law Society of Alberta - the first ever recipient, and in 2010 he was also honored by the Law Society with an award recognizing him as the first ever member to celebrate 70 years of service.

Mr. Jones was predeceased by his wife of 67 years, Yolande, and is survived by his son, Peter; his daughter, Yolande and his son, Craig - along with six grandchildren.

His contributions to the legal profession and his community were many, and he will be missed. ☪

### Judicial Updates

#### COURT OF QUEEN'S BENCH

**John S. Little** (Red Deer) has been appointed as a Justice of the Court of Queen's Bench, effective May 9, 2014.

**Larry R.A. Ackerl, QC** (Edmonton) has been appointed as a Justice of the Court of Queen's Bench, effective June 13, 2014.

**D. Blair Nixon, QC** (Calgary) has been appointed as a Justice of the Court of Queen's Bench, effective June 13, 2014.

#### PROVINCIAL COURT

**James A. Glass, QC** (Central Region/Red Deer) has been appointed as a Provincial Court Judge, effective May 7, 2014.

**Rosanna M. Saccomani, QC** (Edmonton Region) has been appointed as a Provincial Court Judge, effective May 7, 2014.

**Judge Frederick Q. Coward** (South Region/Lethbridge) has retired, effective May 31, 2014.

**Judge Stanley G. Peck** (Edmonton Region/Sherwood Park) has been appointed as a Supernumerary Judge, effective June 1, 2014.

**Judge Richard J. O'Gorman** has been designated as Assistant Chief Judge, Calgary Family & Youth, effective June 2, 2014.

**Judge Paul G. Sully** (Edmonton Criminal) resigned, effective June 17, 2014.

**Judge Robert A. Philp** (Edmonton Criminal) resigned, effective June 30, 2014.

**Judge James C. Koshman** (Edmonton Family & Youth) has been appointed part-time, effective July 1, 2014.

# A VIEW FROM THE BENCH

By The Hon. Judge A.A. Fradsham

This issue of *Law Matters* will land upon you in what I understand to be the thick of the golf season. Now, I confess at the outset that I don't play golf. I also don't drink Scotch. It truly is a miracle that I was allowed into the legal profession at all. In any event, the result is that I know very, very little about golf. What I have learned is what I have gleaned, willingly or otherwise, from those other judges with whom I happily take lunch. However, in true judicial fashion, and in keeping with the highest traditions of the bench, that should not deter me from writing about some facet of reality about which I know almost nothing. Good grief, if we judges only wrote about the bits of life we had actually experienced, case report publishers would wither on the proverbial vine.

Fortunately, the topic of golf has been the subject of writing much more clever than anything I could create. Sir Winston Churchill said that "golf is a game whose aim is to hit a very small ball into an even smaller hole, with weapons singularly ill-designed for the purpose." Bob Hope noted that "if you watch a game, it's fun. If you play it, it's recreation. If you work at it, it's golf."

P. G. Wodehouse, the author of some of the funniest writing in the English language, wrote a number stories about golf (treat yourself to a collection of them in *The Golf Omnibus* by P. G. Wodehouse, available in paperback at Amazon.ca). He devised the ultimate test of a person's character (would that we judges had such a reliable method of determining candour):

"Golf...is the infallible test. The man who can go into a patch of rough alone, with the knowledge that only God is watching him, and play his ball where it lies, is the man who will serve you faithfully and well." (*The Clicking of Cuthbert*).

Now, if one wants two lovely examples of "judicial writing" specifically dealing with golf, I offer the following.

The first is a fictionalized judgment from the book *Uncommon Law* by Sir A. P. Herbert. *Uncommon Law*, and its sequel, *More Uncommon Law*, may be only available from used book sellers, but they are well worth the personal or on-line search.

Sir A.P. Herbert (1890-1971) was a British barrister who never practiced, but served as a Member of Parliament, and entertained many readers of *Punch* with judgments he wrote on behalf of such imaginary legal luminaries as Lord Arrowroot, Lord Sheep, Lord Flake, Lord Mildew, and Lord Bottle.

However, as to the topic at hand, I direct you specifically to the judgment of Mr. Justice Trout in *R. v. Haddock*, in which his Lordship dealt with this thorny issue: Is a Golfer a Gentleman? Under the *Profane Oaths Act, 1745*, each curse attracted a fine of one shilling if launched by a day-labourer,

soldier, or seaman; two shillings if the offender was any other person below the degree of gentleman; and five shillings if the offender was a gentleman or above. Mr. Haddock was charged with, and pleaded guilty to, swearing while playing golf, and with over 400 admitted curses, the category into which Mr. Haddock fell was of some financial consequence.

Trout, J. found that golf, as an activity, was a source of such provocation that the legislation could not be held to apply to it. He accepted defence evidence which proved "the subversive effect [playing golf has] upon the ethical and moral systems of the mildest of mankind." His Lordship held that "[i]t is clear that the game of golf may well be included in that category of intolerable provocations which may legally excuse or mitigate behaviour not otherwise excusable, and that under that provocation the reasonable or gentle man may reasonably act like a lunatic or lout respectively, and should legally be judged as such." That sounds consistent with what I hear at lunch.

Before I leave Sir A.P., and though completely unrelated to golf, I must recommend to you his judgment in another case involving Mr. Haddock: *R. v. Haddock* (Is It A Free Country?), in which Lord Light, L.C.J., observed: "The present issue is one of comparative simplicity. That is to say, the facts of the case are intelligible to the least-instructed layman, and the only persons utterly at sea are those connected with the law", and that "It is a fundamental principle of English law that a person who appears in a police court has done something undesirable...."

The second bit of judicial writing concerning golf to which I direct you is from the real world (well, as real as the world of lawyers and judges gets). In *PGA Tour, Inc. v. Casey Martin*, 532 U.S. 661 (2001), Mr. Martin sought, under the auspices of the *Americans with Disabilities Act of 1990*, a direction that he be permitted to use a golf cart in professional golf tournaments. Justice Scalia (who in my respectful, and admiring view, is as refreshing to American law as Lord





# A VIEW FROM THE BENCH

Denning was to English law) wrote a dissenting opinion in which he said:

"If one assumes, however, that the PGA Tour has some legal obligation to play classic, Platonic golf -- and if one assumes the correctness of all the other wrong turns the Court has made to get to this point -- then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power '[t]o regulate Commerce with foreign Nations, and among the several States', ..., to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years

of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a 'fundamental' aspect of golf."

By the way, if you would like more of Justice Scalia's wonderful writing, and reasoning, read *Scalia Dissents*, edited by Kevin A. Ring, and published in 2004.

Next to the mythical Justice Trout and the very real Justice Scalia, when it comes to writing about golf, it is clear to me that I will require a mulligan. 🏌️



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.** John P. Rusich of Edmonton, AB. DOB July 23, 1954, DOD June 5, 2014. Contact Rita Rusich at [taliaray@shaw.ca](mailto:taliaray@shaw.ca).

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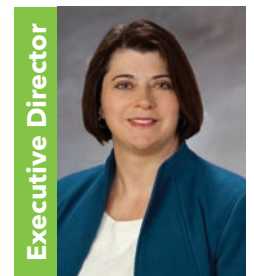
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**Southern Office**  
710, 777 - 8 Avenue SW  
Calgary, AB T2P 3R5  
Phone: 403-263-3707  
Fax: 403-265-8581  
[mail@cba-alberta.org](mailto:mail@cba-alberta.org)

**Northern Office**  
1001, 10235 - 101 Street  
Edmonton, AB T5J 3G1  
Phone: 780-428-1230  
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