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# LAW MATTERS

## Alberta: A Big Role in Shaping Canadian Law

Canadian Law's Last  
Journey to London

R v Klippert

R v Big M Drug Mart

Bre-X: Making Headlines  
20 Years Later



THE CANADIAN  
BAR ASSOCIATION  
Alberta Branch



One Hundred and Fifty Years. This issue of Law Matters takes a moment to reflect on Canada's 150th birthday, and Alberta's "Legal Role" in helping shape those years from Canada's birth to the world-respected Nation which we've become today. To quote this issue's timeline of Alberta's role, we've been "punching above our legal weight" for some time, and, it seems, we have continued to do so. In my experience as a Bencher with the Law Society of Alberta, I have come to understand and appreciate the respect that Alberta has held nationally in the field of law, and this issue helps explain how that respect has been earned. We, as a profession, should be proud of our legacy and should guard our reputation carefully as we move forward into the next 150 years. The road towards excellence in our profession was not an easy one, and was often carved through places where others dared not go. Will Alberta continue to forge difficult, but important, pathways in the law in the future as it has in the past? That will be up to all of us, I suppose. That will be our challenge.



with a broadsword.

Will our lawyers, our Judges and our Law Society be leaders, as they have in the past, or will we follow the pack? I hope it is the former. To paraphrase Robert Frost, I would hope the legal profession in Alberta chooses to take the road less travelled, as that road will most likely make all the difference.

This issue also affords me a moment to say, "Thank-you" to the CBA and to the people who help put together Law Matters each issue. Beginning as a volunteer, I first contributed an article to Law Matters in the spring of 2008, some nine years ago, and eventually, was humbled to be asked to Chair the Editorial Committee for Law Matters. This role is now coming to an end for me, to make way for an incredibly bright young lawyer, Joshua Sealy-Harrington who will be taking over as Editor shortly later this year.

While our history as a profession is laudable, we enter a challenging future, where new paths will have to be set. Our profession is premised on the fundamental belief that all are created equal, but even as we embrace that conception, we ignore the reality that the practical truth is that there are two tiers of justice in Canada, and in Alberta. One for those with the financial capacity to afford a lawyer on full-retainer, and one for those who cannot.

The field of battle in so many of our court rooms today is, in theory, "fair", but imagine a battlefield where on side is fighting with an M16 machine gun and the other engages the battle

My past nine years as a part of Law Matters, and my past few years as Editor, have been amongst the most interesting and enjoyable aspects of my 31 years as a lawyer, and I am truly grateful to all of the Board Members, CBA staff members and contributors who have helped make this an incredibly positive experience, and in particular, a major thank-you to Lee-Anne Wright – the glue holding everything together. Her effort and assistance has been phenomenal.

So. Thanks again for a great ride, and for, I'm sure, more and better things to come! 🍀

Robert G. Harvie, QC  
July 29, 2017

Cover: "Alberta Topographic Map" (istock.com/FrankRamspott)

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BY JEREMIAH KOWALCHUK



We are about to change the guard at CBA Alberta, and it is my pleasure to introduce the 2017-2018 Executive Committee. Join me in congratulating David Heibert of Witten LLP who was successful in our election for Secretary in the spring. David will be joined by Treasurer Ola Malik, Vice President Frank Friesacher, President Jenny McMordie, Executive Director Maureen Armitage, and myself as Past President.

I would also like to pay special recognition to our outgoing Past President, Wayne Barkauskas.

Wayne is a true CBA giant and has made his indelible mark both provincially and nationally, having volunteered in many capacities with the CBA over several decades, including his role on the Executive Committee. Wayne is one of the hardest-working people I know and he has been a friend and mentor to those of us that have shared time with him on the executive. On behalf of the Executive Committee and CBA Alberta membership, I extend our thanks to Wayne for his service to the branch.

Coming up on August 17 is the new CBA Annual Meeting. For the first time in the history of the CBA, all regular members have the opportunity to vote on important resolutions that will shape the future of our organization. Also new this year is the opportunity to participate remotely via hubs in Calgary and Edmonton. Read more about the Annual Meeting, the resolutions to be debated, and register to attend online at [www.cba.org/Who-We-Are/Governance/Annual-Meeting](http://www.cba.org/Who-We-Are/Governance/Annual-Meeting).

Now is also the time for national membership renewal and Section registration. A reminder to our members to look at the Portfolio and Portfolio Plus enhanced membership options when renewing your national membership. These options provide members with education credits that can be used towards CBA PD opportunities, including CBA Alberta Sections, upcoming conferences such as CBA West 2017 in November, and other continuing legal education offerings. If you are a member of multiple Sections, these options are particularly relevant, as they provide up to three materials-level memberships in CBA Alberta Sections. If you plan on registering for Sections, a reminder that your Portfolio or Portfolio Plus package must be purchased prior to registering.

The Law Society of Alberta has recently introduced changes to the CPD program. The CPD program year now begins in September, which brings it in line with the CBA Alberta Section programming year. The CPD declaration period ends on September 30. CBA Alberta Section registration will open the week of August 21. We encourage all members to review

our 2017-18 [Section Handbook](#), which outlines our Section offerings for the upcoming year. This resource will aid in the development of your CPD plan.

This year, we have expanded our webcasting opportunities for all available Sections. Starting in September, all members will have the opportunity to register as webcast members of available Sections (whereas this option had only been available to members living outside of Calgary and Edmonton previously). Whether you live outside of the downtown core, or you are not regularly able to get away from the office to attend meetings, becoming a webcast member of Sections will allow you to remain engaged in the Section of your choice. A reminder that should webcast members wish to attend meetings in person, they will be required to pay a \$25 drop-in fee.

Another opportunity to fill your CPD plan for the upcoming year is our CBA West conference. We are partnering with the CBA BC Branch to put on the premier legal conference for practitioners in Western Canada. Taking place November 17 - 19, 2017 at the Wynn Hotel in Las Vegas, this conference features distinguished speakers such as Supreme Court of Canada Justice Russell Brown, UNLV professor and special counsel Nancy Rapoport, retired Supreme Court of Canada Justice Marshall Rothstein, QC, labour arbitrator and regulatory lawyer James Casey, QC, and many other members of the judiciary and leading legal minds from Canada and the United States. Visit [www.cba-west.org](http://www.cba-west.org) for a full schedule and speakers list, and to register.

CBA Alberta's Agenda for Justice & Advocacy Committee was busy on a number of different advocacy fronts leading into the summer. These include stakeholder discussions on judicial resources and the administration of justice, providing feedback on sustainable and long-term funding for Legal Aid Alberta, and issues of solicitor-client privilege in relation to the Information & Privacy Commissioner's special report to the legislature. You can read more about these ongoing efforts [on our website](#).

In closing, I would like to thank members of the CBA Alberta for the opportunity to serve as President this past year. It has been a rewarding and rich time for me, both personally and professionally. I have met many new people across the country, worked with talented people on the CBA Executive and CBA staff, and made lifelong friends that I would not have met but for the CBA. I am very thankful for the experiences that volunteering for the CBA has given me. There are many ways to contribute to the excellence of the legal profession in Alberta, and I have been privileged as CBA President to how members of our profession (student, lawyers, and judges alike) donate their time and energy to upholding the best traditions of the bar in Alberta. 🇨🇦

DAVID HIEBERT

of WITTEN LLP  
has been elected  
**SECRETARY OF THE EXECUTIVE**  
of the Canadian Bar Association  
Alberta Branch for 2017 - 2018



## M. JENNY MCMORDIE

BY WAYNE A. BARKAUSKAS

As my term on the CBA Alberta Branch Executive comes to an end, I am honoured to introduce you to the new CBA Alberta Branch President Jenny McMordie.

I have known Jenny for more than 15 years, and long before sitting on the CBA Executive together.

We have watched each other's children grow up, have shared ups and downs in our practices, and have shared with each other some of our best and worst experiences over the last 15 years.

The real purpose of this article each year however is to introduce you to the person behind the face and title of CBA Alberta Branch President. This is difficult to do with somebody as multi-faceted as Ms. McMordie but I will make the attempt regardless.

Above all else, my experience is that Jenny's family comes first. Whether this means frequent trips to hockey rinks for tournaments, games and practices, parties for the cast and teachers of various drama productions, supporting her husband's successful music career by managing the home while he performs at "gigs" at all hours of the day and night, or so many other things that illustrate Jenny's family focus.

Two great examples that I can think of immediately include the decision made by her family to move residences to a home that, while not as attractive as she and her husband wished, was located directly across the street for her children. Another example is the effort put in each year to construct a small ice rink in their back yard so that their son can practice his slap shot almost nightly.

In her professional life, Jenny again mixes her professional life with family. She practices civil litigation at Westend Legal Centre in a converted house on the outskirts of downtown Calgary. She and her mother own this firm together and have practiced together for many years. I worked with my father prior to my career as a lawyer and I can only imagine the unique complexities that come with the practice of law with your parent as a partner. I have no doubt that Jenny's gentle caring demeanor is one critical component to the success of this arrangement. To simply state that Jenny has a gentle caring demeanor would be entirely misleading without more however. Jenny has drive and focus and once she determines (usually with great care) the proper path to accomplishing a goal, there is no hurdle that will stop her in her drive to succeed.

She has a unique ability to enlist others in her passionate drive towards goals and does so with a bright smile, such that people find it impossible to say no to her.

It would be fair to state that Jenny, as well as all of the members of the 2017/2018 Executive, are not only exceedingly smart, but they are wise. What I mean is that Jenny seems to understand that no matter how smart she is, it is important to seek the opinion of others, and listen to those opinions carefully and incorporate those opinions with your own before reaching any conclusion on any matter. Ego is "left at the door" and her actions always demonstrate that she believes the best solution

is always a collaborative solution.

There are several things about Jenny that many people do not know, but that help give broader perspective to who she is and how well rounded her perspective on life is. Some of those things are as follows:

1. She has a severe gluten intolerance and at times has been physically crippled by this affliction. As a result she is very careful about her diet.
2. One of her family's passions, is sailing. This is a very difficult passion to have while living in Calgary because the possibilities for sailing are extremely limited. Each summer without fail her family rents a sail boat and cruises off the coast of British Columbia. I know nothing about sailing, but understand that she and her husband's qualifications and training are quite significant. I always shake my head when she describes living on a tiny vessel with the entire family in cramped space for several days at a time without mention of any catastrophic family conflict. Most of us could only wish.
3. Jenny enjoys camping. Not the type of camping that involves a luxury motor home, or even the type of camping that involves driving into a camp site and pitching a tent. She enjoys strapping a back pack onto her back and hiking up a mountain with freeze dried food and only the bare necessities and hanging out in remote locations with only the birds and bugs as company.
4. Jenny and her family are good friends with Raffi, the children's singer and entertainer and you can often find him at their home having a sing along with their very musical family.
5. Jenny has donated her time over the years to several other organizations including her local community board, "Cause Canada" an international relief and development agency working in West Africa and Central America, "Centre for Child Honouring", and other causes.
6. Jenny would never intentionally harm a fly. Literally. She is one of those people that would make every effort to catch any spider she locates within her home in a manner that would cause the least stress possible to the spider and then to release it outdoors to continue on with its life. This is not to say she is not tough. You should never try and stand in her way regarding her plan to save the spider. You will not succeed.



In closing I will simply state that I believe the CBA will be very well served by Jenny McMordie as CBA Alberta Branch President. There are many issues facing our profession at this time that will require the wisdom, compassion, and fortitude that Jenny brings to the table on behalf of CBA Alberta. I wish her and the rest of the 2017/2018 Executive all the best in their continuing efforts to serve the profession. 🍷



## AUGUST

**17:** The Canadian Bar Association presents the **2017 ANNUAL MEETING**. Multiple locations. To register, visit [www.cba.org/Who-We-Are/Governance/Annual-Meeting](http://www.cba.org/Who-We-Are/Governance/Annual-Meeting).

## SEPTEMBER

**7:** The Alberta Lawyers' Assistance Society presents **WALK FOR WELLNESS**. Courthouse Park, Fort McMurray, AB. For more information, visit [www.albertalawyersassist.ca](http://www.albertalawyersassist.ca).

**7:** The Bar Association presents the **2017 JUDGES DINNER**. Fairmont Hotel Macdonald, Edmonton, AB. For more information, visit [www.edmontonbar.com](http://www.edmontonbar.com).

**12:** The Ontario Bar Association presents **CONDUCTING AN EFFECTIVE EXAMINATION FOR DISCOVERY**. Live Webcast. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=ON\\_17CIV0912X](http://www.cbapd.org/details_en.aspx?id=ON_17CIV0912X).

**12:** The Alberta Lawyers' Assistance Society presents **WALK FOR WELLNESS**. Provincial Courthouse Park, Lethbridge, AB. For more information, visit [www.albertalawyersassist.ca](http://www.albertalawyersassist.ca).

**14:** The Ontario Bar Association presents **FAMILY STATUS ACCOMMODATION: STATUTORY PROTECTIONS & LEGAL TESTS**. Live Webcast. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_ONSEP217](http://www.cbapd.org/details_en.aspx?id=NA_ONSEP217).

**14:** The Alberta Lawyers' Assistance Society presents **WALK FOR WELLNESS**. Courthouse Park, Calgary, AB. For more information, visit [www.albertalawyersassist.ca](http://www.albertalawyersassist.ca).

**14-15:** The Canadian Bar Association presents the **CBA NATIONAL INSOLVENCY LAW CONFERENCE**. Sheraton Hotel Newfoundland, St. John's, NL. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_INSOLV17](http://www.cbapd.org/details_en.aspx?id=NA_INSOLV17).

**16:** Edmonton Legal Build presents **2017 RACE JUDICATA**. Borden Park, Edmonton, AB. For more information, visit [www.lawbuild.org/race-judicata-fun-run](http://www.lawbuild.org/race-judicata-fun-run).

**20:** The Alberta Lawyers' Assistance Society presents **WALK FOR WELLNESS**. Courthouse Park, Red Deer, AB. For more information, visit [www.albertalawyersassist.ca](http://www.albertalawyersassist.ca).

**21:** The Alberta Lawyers' Assistance Society presents **WALK FOR WELLNESS**. U of A Faculty of Law Campus, Edmonton, AB. For more information, visit [www.albertalawyersassist.ca](http://www.albertalawyersassist.ca).

**27:** The Ontario Bar Association presents **IMPORT AND EXPORT OPERATIONS: THE ESSENTIAL GUIDE**. Live Webcast. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=ON\\_17INT0927X](http://www.cbapd.org/details_en.aspx?id=ON_17INT0927X).

## OCTOBER

**20-21:** The Canadian Bar Association presents the **CBA LEADERSHIP CONFERENCE FOR PROFESSIONAL WOMEN**. Calgary TELUS Convention Centre, Calgary, AB. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_WLF17](http://www.cbapd.org/details_en.aspx?id=NA_WLF17).

**26-27:** The Canadian Bar Association presents the **CBA COMPETITION LAW FALL CONFERENCE**. Shaw Centre, Ottawa, ON. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_COMP17](http://www.cbapd.org/details_en.aspx?id=NA_COMP17).

**27-28:** The Canadian Bar Association presents the **CBA ANNUAL ACCESS TO INFORMATION AND PRIVACY SYMPOSIUM**. Fairmont Chateau Laurier Hotel, Ottawa, ON. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_PRV17](http://www.cbapd.org/details_en.aspx?id=NA_PRV17).

## NOVEMBER

**2-3:** The Canadian Bar Association presents the **CBA BUSINESS LAW CONFERENCE**. Hilton Toronto, Toronto, ON. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_BUS17](http://www.cbapd.org/details_en.aspx?id=NA_BUS17).

**9:** The Association of Women Lawyers presents the **2017 WILL AWARDS**. Westin Calgary, Calgary, AB. For more information, visit [www.willawards.ca](http://www.willawards.ca).

**16:** The Canadian Bar Association presents the **CBA BUSINESS LAW CONFERENCE**. Hilton Toronto, Toronto, ON. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_BUS17](http://www.cbapd.org/details_en.aspx?id=NA_BUS17).

**17-18:** The Canadian Bar Association presents the **CBA ADMINISTRATIVE LAW, LABOUR AND EMPLOYMENT LAW CONFERENCE**. Shaw Centre, Ottawa, ON. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=NA\\_ADM17](http://www.cbapd.org/details_en.aspx?id=NA_ADM17).

**17-19:** The Canadian Bar Association Alberta & British Columbia Branches present **CBA WEST 2017 CONFERENCE**. Wynn Las Vegas, Las Vegas, NV. To register, visit [www.cba-west.org](http://www.cba-west.org).

**23:** The Ontario Bar Association presents the **ANNUAL UPDATE ON JUDICIAL REVIEW**. Live Webcast. To register, visit [http://www.cbapd.org/details\\_en.aspx?id=ON\\_17ADM1123X](http://www.cbapd.org/details_en.aspx?id=ON_17ADM1123X).

Please send your notices to:

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CATASTROPHIC INJURY AND WRONGFUL DEATH CLAIMS

## CANADA 150: THE CONTRIBUTION OF THE FAMOUS 5

BY **NOREN HIRANI** AND **MELANIE PITUCH**

Many of Canada's legal heroes are men, as women were barred from the profession until the late 1800s. In 1892, Clara Brett Martin first applied to join the Law Society of Upper Canada, but was barred as the LSUC determined that only a "person" could be a lawyer, and women were not persons. In 1892, this legislation was amended to allow women to join the profession and Ms. Martin was admitted as the first female lawyer. In Alberta, the first woman admitted to the bar was not until 1915.

However, the fight for women to be considered "persons" at law was not over once they joined the profession. In 1927, five famous Alberta women - Emily Murphy, Nellie McClung, Henrietta Muir Edwards, Louise McKinney and Irene Parlby - came together to advocate for women to be included within the meaning of "persons" under section 24 of the British North America Act (the "Act"). These women are now commonly referred to as the "Famous 5".

The Act used the word "persons" when it referred to more than one person and the word "he" when it referred to one person and stated that only "qualified persons" could be Senators. The Famous 5 petitioned the Supreme Court of Canada to interpret this provision in the favour of women. The Supreme Court ruled that women were not "qualified persons", preventing women from participating fully in politics or affairs of the federation.

The Famous 5 petitioned the Privy Council to overrule the Supreme Court, and they did. On October 18, 1929, Lord Sankey, Lord Chancellor of Great Britain, announced the unanimous decision of the Lords: "The exclusion of women from all public offices is a relic of days more barbarous than ours. And to those who would ask why the word "person"



MELANIE PITUCH

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

should include females, the obvious answer is, why should it not?"

The Famous 5 not only won the right for women to serve in the Senate but helped pave the way for women to participate equally in - and contribute equally to - all other aspects of life in Canada.

While it is important to remember these achievements, it is important to reflect on what we have yet to achieve. Despite being considered "people" at law, women continue to be excluded from leadership positions in Alberta. In a 2016 survey, it was discovered that women made up only 7% of board members on public boards. Female lawyers made up an even smaller portion - around 2%. There are many reasons for this abysmal statistic.

One commonly cited reason is that women do not have the requisite board experience to be qualified to join a public board. So, how do you get that experience?

Melanie Pituch is a member of the Alberta bar who sits on

two not for profit boards - she is the Vice Chair of the Famous 5 Foundation as well as Secretary of Ghost River Theatre. Melanie began serving these boards while articling, and strongly encourages other young female lawyers to do the same. She believes her experience advising on governance matters, evaluating budgets and contributing to strategy will give her a leg up when seeking public board positions in the future: "It is an excellent opportunity to get board experience first hand, as well as giving back to the community. Many lawyers early in their careers feel they don't have much to offer, but when you are working with non-lawyers, they really appreciate your understanding of contracts and basic legal concepts. It's a way to get a sense of contributing to the community while working on your skills." Melanie found these board positions through Business for the Arts and Propellus and recommends that all lawyers consider joining a board which resonates with their personal interests.

See *Alberta's Legal Timeline*, starting on page 8, for more information on the Famous 5. 📖

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

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

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## MEMBERSHIP RENEWAL AND SECTION REGISTRATION

It is time again to renew your CBA membership and register for your preferred Sections. When renewing your CBA membership, take a moment and review the Portfolio and Portfolio Plus packages that enhance your CBA membership. The purchase of one of these packages gives you:

- CBA education credits, which can be used to register for Sections, CBA West, or other CBA PD opportunities.
- Up to 3 free materials-level Section memberships.
- Rebates on approved CBA purchases.

If you regularly join multiple sections, or plan on attending CBA West 2017 or another CBA conference, these packages can save you money! Visit [www.cba.org/Membership/Why-Renew/AB](http://www.cba.org/Membership/Why-Renew/AB) for more details.

Section registration will begin for CBA Alberta members on August 21. Keep an eye on your emails, as you will receive a message from the Branch once Section registration is available online.

New this year, we are introducing increased webcasting opportunities. Members are no longer required to live outside of Calgary or Edmonton in order to join Sections as webcast members. Whether you live outside of your respective city's downtown core, or have a hard time making it to Section meetings, this is a great opportunity to remain involved in your Sections.

For more information on your local Sections, including registration information and meeting dates, visit [www.cba-alberta.org/Sections](http://www.cba-alberta.org/Sections).

## PRO BONO LAW ALBERTA 10<sup>TH</sup> ANNIVERSARY CELEBRATIONS



Pro Bono Law Alberta (PBLA) hosted two celebrations in June 2017 to celebrate its 10th anniversary and to recognize volunteer contributions in both Edmonton (June 13) and Calgary (June 15) over the past year. The events provided an opportunity to

highlight the pro bono efforts of volunteers, and also recap key milestones achieved by PBLA not only over the preceding year, but over the last 10 years.

Guests of the events included pro bono community partners, volunteer lawyers, LSA Benchers, members of the judiciary, former PBLA Board members and summer students, Faculty of Law students involved in pro bono programs, and court administration support staff. See page 24 for photos of the event.

## ECLC ADVICE-A-THON: VOLUNTEER LAWYERS NEEDED!

The 3rd annual ECLC Legal Advice-a-Thon highlights the work that happens at ECLC every weekday evening - free legal advice to lower income people provided by pro bono lawyers!

Advice-a-Thon lawyers collect financial pledges for their time as donations to the ECLC and provide two half-hour summary legal advice appointments in City Hall. Lawyers can volunteer and collect pledges individually or as a group representing a particular law firm.

For more details and to sign up for a volunteer position, visit [www.eclc.ca/advice-a-thon](http://www.eclc.ca/advice-a-thon).

## CBA WEST 2017



We are counting the days until CBA West 2017 kicks off in November! Join the CBA Alberta and CBA BC Branches in Las Vegas, November 17 - 19, for the premier legal conference for practitioners in Western Canada.

A full list of sessions and speakers is now available on [www.cba-west.org](http://www.cba-west.org). We are excited to welcome such distinguished members of our profession as the Hon. Marshall Rothstein, QC, former Justice of the Supreme Court of Canada, Nancy B. Rapoport, Special Counsel at the University of Nevada, Las Vegas, the Hon. Madam Justice Michele Hollins, past president of the CBA Alberta and national past president of the CBA, and many others.

We have also finalized the details of the Saturday Night Dinner, which will take place at the top of the Stratosphere Casino, Hotel and Tower. Take in the view of the Vegas Strip from 800 feet above Las Vegas, while enjoying dinner and a presentation from the Honourable Justice Russel Brown of the Supreme Court of Canada.

Register before August 15 and be entered to win a stay at the Westin Calgary or Westin Bayshore Vancouver. Visit [www.cba-west.org](http://www.cba-west.org) for more information.

## CHANGE OF ADDRESS: CLERC

The Children's Legal & Educational Resource Centre is now located at:

205 Hala Building  
1712 Centre Street NW  
Calgary, AB T2E 2R3

All other contact details, including phone, fax, email address and website remain the same.

## WHAT ABOUT BOB?

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# ALBERTA'S LEGAL TIMELINE

## ALBERTA: A BIG ROLE IN SHAPING CANADIAN LAW

The 150th anniversary of Canadian Confederation is a natural moment to reflect on Alberta's role in this great national enterprise. And though Alberta did not become a province until 1905 it is quite remarkable what a disproportionately large role this province, its predecessors and its people have had in developing Canada's laws.

In recognition of what might be called "punching above our legal weight" Law Matters has compiled a timeline of Alberta's contributions. While we do not pretend it is exhaustive, it marks many of the significant and sometimes curious legal developments which have emerged in what is now called Alberta.



### JULY 1, 1867: **BRITISH NORTH AMERICA ACT**

The *British North America Act* comes into effect uniting the Provinces of Canada (which was to become Ontario and Quebec), Nova Scotia and New Brunswick. It has no immediate impact on the territory which will become known as Alberta.

### JUNE 23, 1870: **RUPERT'S LAND ACT**

A vast territory which had been controlled by the Hudson's Bay Company since 1670, including all present-day Alberta, is admitted to Canada.

1800

### PRE-CONTACT

For thousands of years Indigenous People lived in what is now Alberta. The First Nations in the region were primarily, though not exclusively, nomadic peoples often organized into kinship groups. Given traditional knowledge as well as archeological and ethnological evidence it seems certain pre-contact First Nation groups adopted customary laws. With contact First Nation territory and way of life were sometimes tragically eroded by settler society.

*The University of Calgary's David Laidlaw reviews key developments in First Nations relationships with the federal and Alberta governments.*

### 1794: **FIRST FORT EDMONTON ESTABLISHED**

For thousands of years Indigenous People lived in what is now Alberta. The First Nations in the region were primarily, though not exclusively, nomadic peoples often organized into kinship groups. Given traditional knowledge as well as archeological and ethnological evidence it seems certain pre-contact First Nation groups adopted customary laws. With contact First Nation territory and way of life were sometimes tragically eroded by settler society.

*Over the course of about 120 years the fort moved five times and was variously known as Fort Edmonton, Edmonton House, Amiskwaskahagan by local Cree who are believed to have occupied a nearby river shore campsite for 8,000 years and Fort-des-Prairies by couriers des bois. The fifth and final structure stood next to the new Alberta Legislature Building. It was dismantled in 1915.*

1875

### MAY 23, 1873: **MOUNTED POLICE FORCE**

Parliament passes an act to establish a "Mounted Police Force for the North West Territories". The red-coated Force is intended to underline Canadian sovereignty over the area, curb the liquor trade and establish law and order. In July of 1874 the column started its historic western march from Dufferin, Manitoba.

*The marchers broke into two columns. One headed north to Fort Edmonton, the other headed toward the southern part of what is now Alberta. There, what came to be known as the NWMP built Fort Macleod. They begin controlling the liquor trade and establishing friendly relations with First Nations. In August 1875 they create another post near the junction of the Bow and Elbow Rivers. It will be called Fort Calgary.*



# ALBERTA'S LEGAL TIMELINE

## 1874: FIRST NATIONS TREATIES

Between 1874 and 1906 five treaties covering all the territory of what will become the province of Alberta were signed with First Nations.

## DECEMBER 18, 1885: FIRST REGULATION OF THE LEGAL PROFESSION IN THE NORTH-WEST TERRITORIES

In 1885 the Territorial government instituted *An Ordinance Respecting the Legal Profession*.

*The Ordinance Respecting the Legal Profession set down the qualifications for certification as an "Advocate of the North West Territories". Among other business conducted the same day was an Ordinance relating to Medical Practitioners and an Ordinance to amend an Ordinance respecting Dangerous Lunatics. See [Ordinances of the North-West Territories](#).*

## JULY 1, 1893: CRIMINAL CODE OF CANADA

The *Criminal Code of Canada* is proclaimed. It was enforced across the country including in the territory destined to become Alberta and Saskatchewan.

## 1898: LAW SOCIETY OF THE NORTH-WEST TERRITORIES

The creation of the Law Society of the North West Territories in 1898 established the English and Ontario models of a self-governing legal profession in the Territories.

## JULY 5, 1905: ALBERTA BECOMES A PROVINCE

The Alberta Act 1905, passed by the House of Commons in Ottawa a few minutes before midnight. The Act was granted Royal Assent July 20, 1905.

*See the Montreal Gazette's coverage of the [third reading of the Alberta bill](#).*

## 1910: R v STONEY JOE

An influential aboriginal ruling. The court concluded Alberta's provincial game laws did not apply to Stoney Nakoda Indians because they were subject to the federal Indian Act not provincial legislation.

See [David Laidlaw](#)

## 1912: UNIVERSITY OF ALBERTA FACULTY OF LAW

Faculty of Law created at the University of Alberta. It was the first university law school in western Canada. (This claim is disputed by the University of Saskatchewan, but *Law Matters* considers the issue is best left to legal scholars, a long night and a good bottle of Scotch.) U of A offered classes in both Edmonton and Calgary. In 1915, the first graduating class numbered eight.

1885

1900

1910

## 1885: HOT SPRINGS RESERVE

Ottawa establishes a 26 sq. km. Hot Springs Reserve around what is now Banff., Alberta. On June 23, 1887, *The Rocky Mountains Park Act* expands the area and establishes Canada's first national park later to be called Banff National Park in what will become Alberta.

The federal government's approach slowly changed and in 1930 the National Parks Act was passed. It proclaimed in s.4 that "The Parks are hereby dedicated to the people of Canada for their benefit, education and enjoyment...and such Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations."

*Retired University of Calgary Professor Emeritus of Law, Ian Rounthwaite is an acknowledged legal expert on Canada's national parks. He says "the government at the time was very concerned with seeing the CPR develop and prosper through the creation of our first national park. The establishment of Banff was not in any way, shape or form for environmental, conservationist or ecological reasons it was purely for economic reasons and the best interests of the CPR."*

## 1888: TERRITORIAL COURTHOUSES

Before Alberta became a province in 1905 the Territorial Government was responsible for court facilities. Between 1888 and 1905 they built 12 territorial courthouses. The oldest remaining courthouse building in Alberta was erected in 1904 in Fort Macleod.

[See More](#)

## 1915: CREATION OF THE CANADIAN BAR ASSOCIATION - ALBERTA BRANCH

Its first president (1915-1928) was the prominent Calgary lawyer R.B. Bennett. He later became Prime Minister of Canada (1930-1935).

## 1914 - 1918: THE FIRST WORLD WAR

Close to 60 Alberta lawyers and law students give their lives in the First World War.

## 1916: EMILY MURPHY

Emily Murphy presides over a women's court in Edmonton. It is believed she was the first women magistrate in the British Empire.



## JUNE 28, 1918: RE LEWIS

The Alberta Supreme Court, Appellate Division rules farmers previously exempted from military service cannot be conscripted on the strength of a federal order-in-council amending the *Military Service Act*. A stand-off ensues.

*Lewis and some other men were being held by the military at Sarcee Barracks in Calgary. A stand-off developed when the Army, in spite of the Alberta court ruling initialled declined to give the men up. There was some thought on the part of the military of moving the men to another province to escape the authority of the Alberta Supreme Court. There were reports of soldiers setting up a machine gun at the barracks. In the end, the military relented and the matter went to the Supreme Court which overturned the Alberta judgment, but the war by then was nearly over.*

## APRIL 24, 1928: EDWARDS v CANADA

Emily Murphy, the Calgary woman who in 1916 was appointed the first woman magistrate in the British Empire, later sought an appointment to the Canadian Senate. Her application was rejected by the Prime Minister Robert Borden, on the grounds women were not “qualified persons” under the *British North American Act*. In 1927 a group of five Alberta women led by Murphy managed to persuade the government to bring a reference case before the Supreme Court of Canada on the question of whether the phrase “qualified persons” in s. 24 of the *BNA Act 1867* include women? The Supreme Court unanimously found were not “qualified persons”.



## OCTOBER 1, 1930: NATURAL RESOURCES TRANSFER ACT

The *Natural Resources Transfer Act* becomes law. Provocatively called “Alberta’s real constitution” by now-retired University of Calgary professor Tom Flanagan in a collection of essays, *Forging Alberta’s Constitutional Framework* published in 2005. The *Act* granted Alberta as well as a Saskatchewan and Manitoba full control of their natural resources something they had been denied when they entered Confederation.

## JUNE 6, 1932: R v WESLEY

1920

## MAY 2, 1923: THE ONLY WOMAN EVER EXECUTED IN ALBERTA IS HANGED

Florence Lassandro convicted in the shooting death of a police officer in Coleman, AB. The *Calgary Daily Herald*, reported that Lassandro’s last words were: “Is there not anyone who has any pity?”

## MARCH 21, 1928: SEXUAL STERILIZATION ACT

The *Sexual Sterilization Act* (1928) becomes law in Alberta. Under the *Act* the Alberta Eugenics Board was established. It determined if people were “feebleminded” and if so ordered their sterilization. It was not repealed until 1972.

Read "[Forced Sterilization: How the law righted an ugly wrong in Alberta History](#)" for one brave woman's fight to right this wrong (page 14).

1930

## OCTOBER 29, 1929: CANADIAN WOMEN DECLARED PERSONS

*Edwards and Others v. Canada* (Attorney-General). Murphy and four other women took the matter to the then final court of appeal, the Privy Council. It overturned the Supreme Court of Canada and found women were “qualified persons”. The case is called *Edwards* because the Appellants were listed alphabetically so Henriette Muir Edwards’ name appears first.

*In Edwards, Lord Sankey ruled that “the exclusion of women from all public offices is a relic of days more barbarous than ours” and that “customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.” In the Persons Case there was no reason why women could not discharge the parliamentary duty of office. In terms of the efficacy of the actual British North America Act, which today we call the Constitution Act, 1867, Lord Sankey, famously remarked that the Act “planted in Canada a living tree capable of growth and expansion within its natural limits.” This metaphor of the Constitution as a living tree has taken root since the 1930 Persons Case and has become a guiding doctrine in our constitutional jurisprudence.*

Sankey's decision can be found [online](#).



## AUGUST 7, 1930: PRIME MINISTER R.B. BENNETT

Calgary lawyer and entrepreneur Richard Bedford Bennett (the Bennett in the Alberta law firm of Bennett Jones) becomes prime minister. The first Albertan to hold the office his government is bedevilled by the Great Depression but still manages to pass a string of important legislation.

See The *Calgary Daily Herald*'s coverage of [Bennett's election](#).



# ALBERTA'S LEGAL TIMELINE

## 1935: BANKERS' TOADIES CASE

A one-page leaflet distributed around the Social Credit dominated Alberta legislature identified a group of Liberal and Conservative party supporters, primarily lawyers, as Bankers' Toadies and called for them to be "exterminated". Toady is a mainly English expression suggesting obsequious sycophancy. The perpetrators turned out to be Social Credit functionaries. They were convicted under the *Criminal Code* of defamatory libel and sentenced to several months of hard labour. Social Creditors believed the two men were being "punished" by the old-line Establishment. The case was for more than a quarter century a mainstay of criminal defamation law in Canada.

*One of the convicted men, Joseph Unwin gave an account of the incident in this undated [audio recording](#).*

## 1946: TOKYO WAR CRIMES TRIBUNAL

Alberta's Henry Gratten Nolan, who was awarded the Military Cross in the First World War, and later became a Rhodes Scholar and distinguished lawyer in Calgary in the interwar years, joins the war crime trials in Japan (also known as the Tokyo War Crimes Tribunal) as a prosecutor. He serves in this role until 1948.

## DECEMBER 18, 1946: LETHBRIDGE EXECUTIONS

Five men were executed in the Provincial Gaol in Lethbridge in the biggest mass hanging in Alberta history. They included four German POWs convicted of murdering a fellow German POW at a camp in Medicine Hat. A fifth man, completed unrelated to the POWs, was also hanged that day. He was a Canadian soldier convicted of murder during a sex crime.

[Read More.](#)

## MARCH 1, 1956: HENRY GRATTON NOLAN

Henry Gratten Nolan, (see 1946) becomes the first Albertan named to the Supreme Court. He served for a year and died of a heart attack at his summer home in Banff on July 8, 1957 at the age of 64. In January 1958, he was replaced by the second Albertan to be called to the Supreme Court, Ronald Martland.

[Read More.](#)

## 1960 - LAST TRIP BY CANADIAN LITIGANTS TO THE PRIVY COUNCIL

Alberta lawyer Bill Morrow (later Justice Morrow) manages to take a case over a small drilling project near Leduc all the way to the Privy Council in London more than ten years after the Supreme Court became the final court of appeal in Canada.

*Read more in "[Canadian law's last journey to London](#)" (page 16).*

## 1950

## MARCH 4, 1938: REFERENCE re ALBERTA STATUTES

William (Bible Bill) Aberhart's Social Credit government passed several pieces of legislation inspired by the social credit philosophy. They quickly ran afoul of the federal government as being beyond provincial power. Finally, after several twists and turns, the Supreme Court was asked to consider Alberta laws concerning the regulation of banks and credit and the press. The press bill was ominously titled "An Act to ensure the Publication of Accurate News and Information". The Court found the proposed legislation was beyond provincial power and of no force or effect. The decision is pointed to by many scholars as the foundational case in establishing an Implied Bill of Rights in Canada.

## MAY 19, 1954: CPR v TURTA

University of Calgary Professor Emeritus of Law, Ian Rounthwaite calls this case "probably the most important Supreme Court of Canada decision dealing with the principle of indefeasible title under our land titles system".

*In 1954, the CPR unsuccessfully appealed an Alberta Court ruling that found that Turta was the rightful owner of oil and gas rights under a quarter section of land because of an error made in the Registrar's office. Professor Rounthwaite says the Turta case "established that even if there is an error made in the Registrar's Office in terms of reserving oil and gas that if the party who takes a transfer is innocent of the error, the party that receives the transfer still receives indefeasible title to (in the Turta case) oil and case though it was the intention of the CPR when it transferred title to Turta to reserve gas and oil to themselves. Due to an error in the Registrar's office only coal was reserved not oil and gas so the oil and gas rights passed to Turta.*

## 1960

## NOVEMBER 15, 1960: THE LAST EXECUTION IN ALBERTA

Twenty-two-year-old Donald Cook, convicted of killing seven members of his family in Stettler, was hanged shortly after midnight in the Provincial Gaol, Fort Saskatchewan.

*Read more in coverage from [The Edmonton Journal](#) and [The Calgary Daily Herald](#).*

## 1967: R v KLIPPERT

His case went to the Supreme Court. Even so, Everett Klippert, an Alberta man, is believed to be the last Canadian convicted of homosexual relations before the law was changed.

*Read more in "[Everett Klippert: Canadian legal history's troubling hero](#)" (page 23).*

# ALBERTA'S LEGAL TIMELINE

## SEPTEMBER 1976: UNIVERSITY OF CALGARY FACULTY OF LAW

University of Calgary officially opens its Law School with a first-year class of 60 and nine faculty.

[Read More](#)

## JUNE 4, 1979: PRIME MINISTER JOE CLARK

Joe Clark from High River, AB becomes prime minister. A non-lawyer, he served for only 9-months before his defeat by a resurgent Pierre Trudeau.

*While his tenure was brief his government astounded the world by accepting close to 50,000 refugees, the so-called "boat people". They entered Canada from Vietnam, Laos and Cambodia. It is estimated that during this wave of migration some 8,000 refugees from southeast Asia came to Alberta. [Read more](#) in the June 5, 1979 edition of The Calgary Herald.*



## SEPTEMBER 17, 1984: HUNTER v SOUTHAM

It was only the second *Charter* case to go to the Supreme Court. Five days before the Queen signed the *Charter* on Parliament Hill, Combines Investigation officers raided the *Edmonton Journal* and seized documents. They acted on the basis of a warrantless search authorized under the *Combines Investigations Act*. The Supreme Court found the search was inconsistent with the protections provided by s 8 of the new *Charter* against unreasonable search and seizure. The decision had a sweeping impact on Canadian law.

## FEBRUARY 1, 1990: R v BRYDGES

The Supreme Court found an arrested Edmonton man's Charter right to counsel was denied when police were slow to put him in contact with Legal Aid. As a result, so-called Brydges counsel is now a telephone call away in most Canadian police stations.

[Read more in "Under arrest? No lawyer? Who you gonna call?" \(page 25\).](#)

## DECEMBER 13, 1990: R v KEEGSTRA

An Eckville school teacher (and sometime mayor of his town) taught his students that the Holocaust was a lie. He was charged with wilfully promoting hatred. The Supreme Court majority decided freedom of expression did not trump the evils of hate speech.

[Read more in "Hate and Free Speech: A Supreme balancing act" \(page 26\).](#)

## 1980

### SEPTEMBER 1980: NOTWITHSTANDING CLAUSE

Alberta premier Peter Lougheed was a key player in the lengthy and contentious inter-governmental negotiations surrounding the patriation of the constitution. One of Alberta's fundamental contribution was raising the notion of a Notwithstanding Clause. Lougheed attributed the idea to his attorney general (and long-time corporate lawyer) Merv Leitch. When Leitch first raised the idea Lougheed's initial reaction was "What the hell is a notwithstanding clause?"

See Lougheed's account of [what happened](#).

### APRIL 17, 1982: CHARTER OF RIGHTS & FREEDOMS

The *Canadian Charter of Rights and Freedoms* signed into law.

See the [full CBC coverage](#).

### APRIL 24, 1985: R v BIG M DRUG MART

Two Calgary store owners who wanted to sell goods seven-days-a-week, challenged the *Lord's Day Act*. They argued restrictions on Sunday shopping infringed their s2 (a) *Charter* rights to freedom of conscience and religion. After a long battle the Supreme Court agreed. The decision over time transformed Canadian society and Sunday is now one the country's busiest shopping days.

[Read more in "Big M Drug: How a bicycle lock and the Charter changed Canada's Sundays" \(page 24\).](#)



## 1990

### NOVEMBER 7, 1991: R v STINCHCOMBE

Stinchcombe, a Calgary lawyer became embroiled in a series of court cases surrounding allegations he misappropriated funds. He was cleared after a lengthy battle and in 2002 his licence to practise law was reinstated. Stinchcombe is seminally important because the Supreme Court ruled as Justice Sopinka put it in his unanimous judgment, "the Crown has a legal duty to disclose all relevant information to the accused." It was a decision that forever changed the way the Crown prosecutes an accused person. Today, the Crown is compelled to disclose to the defence all the evidence it will rely upon in any trial.



## MAY 19, 1997: BRE-X FILES FOR BANKRUPTCY PROTECTION

It was the beginning of the end for Calgary-based Bre-X when it became apparent claims of the richest gold find of all time proved to be based on "salted" samples. Investors from around the world lost more than a billion dollars.

*Paul Pape, a Toronto lawyer representing investors, called the Bre-X saga "one of the greatest frauds perpetrated in North America." The Bre-X principles denied all knowledge of the swindle. In the end, no criminal charges were laid and all civil actions were dismissed. Read more in ["Bre-X: The Calgary-based stock scandal still making headlines 20 years later"](#) (page 27).*

FEBRUARY 2006 - NOVEMBER 2015:

## STEPHEN HARPER, THE THIRD ALBERTAN TO BECOME PRIME MINISTER

The Toronto-born, Harper moved to Alberta soon after finishing high school. He was an economist by training rather than a lawyer. When he became prime minister he introduced a law-and-order agenda. It featured tougher sentencing for convicted criminals. Harper also tightened security laws including enhanced surveillance and detention measures and scrapped the federal gun registry. The Harper government also experimented with ways of making appointments to the Supreme Court more transparent, though opponents argued he was actually trying to stack the Court with political friends. It is probably too early to properly assess Stephen Harper's contributions to Canadian law.

## MAY 7, 2015: BOWDEN INSTITUTION v KHADR

The Alberta Court of Appeal releases Omar Khadr from detention under strict conditions. His release came after more than 12 years in custody, 10 of those years in Guantanamo Bay. Khadr's release was a triumph for his long-time lawyer from Edmonton Dennis Edney.

*Edney spearheaded efforts to bring the Toronto-born former child-soldier back to Canada and then fought for his release in this country. Omar Khadr was captured in Afghanistan after a firefight with US troops in which a US soldier was killed and another severely wounded. Edney was interviewed by CBC Radio's Ideas program in 2016. That interview is available [online here](#).*

2000

2010

## APRIL 2, 1998: R v VRIEND

A teacher's employment at an Edmonton college was terminated because he was homosexual. Sexual orientation was not protected under Alberta's *Individual's Rights Protection Act* (now the *Alberta Human Rights Act*). The Supreme Court found the *Act* contrary to guarantees of equality in the *Charter*. Alberta premier Ralph Klein faced pressure from *Charter* opponents and others to use the Notwithstanding Clause to override the Court's decision but ultimately declined. The decision led to a national debate and in the end helped advance LGBTQ rights across the country.

See coverage from [CBC Edmonton](#).

## APRIL 9, 2009: R v PATRICK

This Supreme Court judgment, on appeal from the ABCA, found there was no reasonable expectation of privacy in garbage bags once put out for collection. In effect, the court found there was nothing illegal about removing things from a householders' garbage. The decision had a sweeping impact across the country. It confirmed it was now legitimate for people to go through a householder's garbage and remove what they wished. It reinvigorated bottle recycling programs and ensured a small income for thousands of Canadian bottle pickers. It is doubtful these consequences were in the minds of the Supreme Court justices when they found Calgary police did not infringe the s 8 *Charter* rights of a suspected drug dealer by collecting evidence, without a search warrant, from his garbage. The justices concluded the evidence collected was admissible.

## JULY 4, 2017: KHADR SETTLEMENT

The Canadian government agrees to suspend legal action and pay more than \$10-million in compensation to Khadr. Controversy ensues.

Photos:

1. Map of Alberta (iStock.com/KeithBinns)
2. Fort Edmonton (iStock.com/wwing)
3. Emily Murphy, c.1917 (Public Domain, <https://commons.wikimedia.org/w/index.php?curid=46547348>)
4. PM McKenzie King unveils a plaque commemorating the "Famous Five", 11 June 1938 (Public Domain, <https://commons.wikimedia.org/w/index.php?curid=3350561>)
5. Richard Bedford Bennett, between c.1930 and c.1935 (Public Domain, <https://commons.wikimedia.org/w/index.php?curid=162625>)
6. Joe Clark, c.1983 (By Alasdairroberts - Own work, CC BY 3.0, <https://commons.wikimedia.org/w/index.php?curid=7392743>)
7. *Canadian Charter of Rights and Freedoms*

## FORCED STERILIZATION: HOW THE LAW RIGHTED AN UGLY WRONG IN ALBERTA HISTORY

BY GEOFF ELLWAND

Early in 2016 a courageous woman Leilani Muir-O'Malley, who suffered a great injustice at the hands of the Alberta government, died of natural causes near Edmonton at the age of 71. In 1956 she was placed in the Provincial Training School in Red Deer and certified, in the terminology of the day, as "a mental defective". In 1959, at the age of 14, after being told she was having her appendix removed, she was instead, sterilized. But she was never told and only learned of the procedure in 1980 when she went to a doctor to find out why she could not get pregnant.

The sterilization of Muir-O'Malley and of thousands of others were conducted in the name of the Alberta Sexual Sterilization Act passed in 1928 and incredibly not repealed until 1972. It was part of a misguided program overseen by the now defunct Alberta Eugenics Board (1928-1971) to stop the transference of "biological defects" to the next generation "of deviants".

It was a profound wrong that a determined and undaunted Muir-O'Malley and a handful of talented and dedicated Edmonton lawyers finally put right, or at least as right as the law can put it. The arduous, lengthy and but ultimately successful battle waged by Muir-O'Malley over her forced sterilization also saw hundreds of similarly mistreated people benefit from court imposed settlements on the Alberta government.

One of those talented and dedicated Edmonton lawyers who helped Muir-O'Malley was Myra Bielby. Today, Bielby sits on the Alberta Court of Appeal but in 1989 she was a partner in an Alberta law firm, now known as Field Law. She got a call from a friend who was with the then relatively new advocacy group called the Woman's Legal Education and Action Fund (LEAF). The friend asked Bielby if a woman, who had been turned down by a string of lawyers and whom LEAF did not have resources to help, could come and see her.

The woman was Leilani Muir (she later added O'Malley to her name). As Bielby recalls Muir arrived at Field's downtown Edmonton office "with shopping bags full of materials" along with a complicated and startling story. After talking to her, Bielby decided while "it didn't look too promising, there was something here." Before taking the case Bielby had to get clearance from her Firm's senior management because some disbursements would be charged to the Firm's accounts. When she approached the managing partner Bob Teskey she recalls him saying rather enigmatically "Well Myra, God is with you". Bielby "took that as a yes" and proceeded with the case.

She carried the matter forward doing considerable preliminary research (including, incidentally establishing that Muir was of normal intelligence) and went as far as writing and filing a Statement of Claim with Alberta's Court of Queen Bench. Then on Dec 24, 1990 (as was the tradition in Alberta) she got a phone call. She had been appointed to the Bench. With that, Bielby had to hand the case off. It fell ultimately to Sandra Anderson who had articulated with Bielby.

When Anderson first became involved in the Muir case in 1991

she recalls "I was a pretty junior associate". But by the time the case had ground through discovery it was 1995 and Anderson was heading for a partnership. Then just months before the scheduled June trial date a remarkable thing happened. It was probably the key break in the case.

Anderson received a call from Alberta Justice. Up until then Justice said it only had limited records associated with Muir, but more or less at the last minute "they had discovered in some obscure corner of the Provincial Archives the records of the (Alberta) Eugenics Board." Anderson was invited over to read the six boxes of materials. The material included the minutes of the Eugenics Board and Anderson remembers that reading them "was quite an experience. It was mind-numbing to read how the Eugenics Board operated. It was just officialdom at its worst."

Two weeks before the scheduled start of the case, a senior partner and general litigator from Field, Jon Faulds "got tapped on the shoulder" as lead counsel. He had a reputation for being a very quick and incisive study. He recalls "there was a huge amount of material". But relying on Anderson's research he quickly concurred with his junior that the Board minutes showed "all kinds of irregularities". Faulds found "a lot of evidence the whole thing was a rubber stamp including the signing of documents (approving sterilizations) even before the so-called hearings had even been conducted." He concluded there was significant evidence that the way the Board conducted itself "was not consistent with their obligations under the Act".

Among Faulds' witnesses was Muir herself and he remembers the government lawyers went after her hard but "the more they tried to knock her down, the stronger she became." Then there was one of the government's expert witnesses, Dr Margaret Thompson, a geneticist, a professor at the University of Alberta and a one-time member of the Eugenics Board. She was subject to what Faulds calls "an extremely surgical" cross examination by Sandra Anderson which exposed before the court what the Board minutes showed, that the Board in the name of the government acted well beyond its legislated power.

Madame Justice Joanne Veit found in favour of Muir ordering that the Province pay compensation totalling \$740,000. In her powerful and persuasive judgment Justice Veit wrote: "The circumstances of Ms Muir's sterilization were so high-handed and so contemptuous of the statutory authority to effect sterilization, and were undertaken in an atmosphere that so little respected Ms Muir's human dignity that the community's, and the court's sense of decency is offended."

For Muir-O'Malley "it was total vindication" Faulds recalls, "for me it was a chance to represent a hero." 🗣️

*A version of this story appeared in Canadian Lawyer in May 2016.*












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## CANADIAN LAW'S LAST JOURNEY TO LONDON

BY GEOFF ELLWAND

What do eating Brussels (correct) sprouts at the House of Lords, an Alberta oilwell, a tenacious lawyer and Canadian legal history have in common? The thread that joins them all is the last trip to London by Canadian lawyers to argue a case before the Privy Council's Judicial Committee.

Historically, the court of final appeal for Canadians and other British colonies was the Judicial Committee of the Privy Council, an august body of some of the finest legal minds in Britain. While travelling to London and wearing a rented wig in court was often the pinnacle of a colonial lawyer's career, it was a cumbersome and expensive proposition. It also undermined the authority of the Supreme Court of Canada and after the First World War increasingly offended Canada's growing sense of national self-sufficiency. So in 1933 Parliament ended appeals in Canadian criminal cases to London, and in 1949 they did the same thing for civil matters. A few civil cases already underway continued on to England, but by the mid-fifties appeals to the Privy Council by Canadians were a relic of our colonial past...or so, everybody thought.

*Ponoka-Calmar Oils Ltd. et al. v. Earl F. Wakefield* (known in the Supreme Court of Canada as *Wakefield v. Oil City Petroleum et al.* [1958] SCR 361) was a complex, dragged out fight over a small oil drilling project in the burgeoning oil fields near Leduc, Alberta. It was a matter which wended its way through the court system for more than ten years. And when all the issues had been reduced to a single controversy - that being who would pay a \$30,000 oil drilling bill - it landed, quite unexpectedly before the Judicial Committee of the Privy Council. It was the last Canadian case to make the long journey to London and the foot of the throne. As such, in spite of its rather uninspiring facts, it holds a special place in Canadian legal history.

It was an inventive and tenacious Alberta lawyer, Bill Morrow, who got the case before the Judicial Committee. He represented a group of Edmonton area lease holders (Ponoka-Calmar Oils

Ltd.) in a dispute with a Kansas oil driller (Earl F. Wakefield). Morrow would later gain distinction as Justice Morrow in both the Northwest Territories and Alberta. James "Herb" Laycraft, the former Chief Justice of Alberta, died in 2015, but a few years before his death he recalled his involvement in that last legal trip to London. He remembered Morrow as "a litigator

who never gave up" and a man with a well-honed sense of history. This case is a classic example of Morrow's determination.

He repeatedly said of his cases if he felt he was right he was prepared "to go all the way".

In his autobiography *Northern Justice*, Morrow outlined the remarkable history of this case and what he meant by, to go all the way. "My client and I were involved with the Supreme Court of Alberta five times, the Court of Appeal three times, the Supreme Court of Canada twice and finally the Privy Council."

Bill Morrow's final appeal before the Supreme Court of Canada on this matter in 1958 did not go well. He had hoped that because his appearance fell on the same day as his birthday, February 5, it might be a good omen. But he wasn't feeling especially confident as he made

his way back to Edmonton by plane. He was mulling over what he could do next for his client, when a remarkable idea hit him. He wrote later, "I was asking myself if by chance our case was old enough to be appealable to the Privy Council."

And indeed it was.

The original Statement of Claim in the matter had been issued on December 5, 1949. The *Supreme Court Act* making the Supreme Court the "exclusive ultimate" appeal court for Canada had been proclaimed on December 23 of the same year. "By these few days" Morrow recalled, "history was to allow my side another chance." And just as Morrow had anticipated, things did not go well in Ottawa. The Supreme Court judgment came out against his clients so Morrow almost immediately sought leave to appeal to the Privy Council and went to London to make his case. Leave was granted and in the summer of 1959, the Canadian lawyers including Morrow





# THE PRIVY COUNCIL

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as lead counsel for Ponoka-Calmar and Herb Laycraft as junior for Earl F. Wakefield Company headed for London. Another junior on that last trip was William Stevenson who was to go on to serve on the Supreme Court. He now lives in retirement in Edmonton.

In London, the lawyers were to see some of the ancient traditions associated with the highest level of the British judicial system, which is, of course, the root of our own system of justice. They had to rent wigs, a novel experience for Canadian lawyers, and appear gowned before the Judicial Committee even though the Law Lords, Laycraft recalled, wore "rather tweedy business suits". Among the Law Lords was Lord Denning (Alfred Thompson Denning). He was already building an extraordinary reputation for his writings on the law and his special turn of phrase in his judgments. Several years later Denning wrote his famous judgment in *Miller v Jackson* [1977] QB 966, a lyrical tribute to English country cricket.

The Dickensian surroundings in London led Morrow to write some years later: "As I made my daily trips to and from the Inns of Court and to No. 3 Downing Street (the Court room used by the Privy Council) I was able to, in my romantic mind's eye, relive hundreds of years of legal history."

Laycraft would smilingly recall being taken to lunch at the British House of Lords. Laycraft and the other lawyers representing Wakefield, accompanied by their London solicitor, walked from

the Privy Council building in Downing Street "fully robed, wigs on and in single file to the House of Lords, across six or eight lanes of traffic." A London police officer brought cars to a halt so they could cross with ease. At the dining room "we were received with great ceremony and ushered into a magnificent room and seated." But Laycraft, who had an aversion to Brussels sprouts remembered it as "one of the worst meals of my life with lots of those little cabbages". He said, "I have always wondered what our London solicitors paid for that dreadful lunch."

The Judicial Committee was in no hurry to get through the arguments, and it took four days to hear them. Laycraft said he came away with a profound admiration for "the English court system at its peak, but it wasn't needed for a \$30 thousand dollar case." He said at the time it seemed natural enough. "But in retrospect" he said "I am left with the feeling that the traditions of that place were not our traditions, that the law for Canadians should be made by Canadians."

In the end, the Law Lords found for Earl F. Wakefield, and the Kansas oil man got his money. The loss also meant that Morrow who was working on what we would now call a contingency basis got nothing. But buoyed by his brush with a never-to-be-repeated historic event he wrote sometime afterward: "It is true I had worked hard for no fee - to have had one chance to appear before the Judicial Committee would have to be my fee. I think I was well paid." 🍷

*This is an updated version of a story that appeared in Lawyers Weekly in the spring of 2011.*



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# DISCOVER YOUR 2017-18 **SECTIONS**

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## EVERETT KLIPPERT: CANADIAN LEGAL HISTORY'S TROUBLING HERO

BY GEOFF ELLWAND

An Alberta man, Everett George Klippert has been described as the last man in Canada imprisoned for homosexual acts between consenting adults. Now after years of obscurity his case is back in the news.

Some details of Klippert's life are clouded and troubling. But what is absolutely clear is that his controversial imprisonment as a dangerous sexual offender in 1966 clarified minds on Parliament Hill and played a significant role, three years later, in the passage of legislation that finally decriminalized homosexuality.

But the line from Klippert's offences and convictions, to the laudable change in the law, his subsequent release and return to a quiet and very private life in Edmonton is not one without a few knotty problems.

The first troubling question is: Was Klippert a paedophile?

Klippert had two significant brushes with the law. In 1960 while working as a bus driver in Calgary the 33-year-old was convicted of 18 charges of "gross indecency" under the then s. 149 of the *Criminal Code*. At the time, gross indecency was the charge laid against those alleged to have engaged in homosexual practices.

At his May 1960 trial he pleaded guilty to all charges. Competing Calgary daily newspapers both quote the Crown in the trial as identifying Klippert's "victims" as "young boys", though the papers never reveal the so-called young boys' ages. Nor do the ages of the "the boys" appear in the information issued against Klippert. The Court was told Klippert met many of his partners while driving the bus and would give them free rides or sometimes a two-dollar bill.

"I have seen those newspaper reports and I really have no idea what they mean" says Toronto lawyer Doug Elliott. He has been investigating the Klippert case for some time. "Depending on your perspective it could mean someone under 30, someone under 18, or someone under 12." If they had been prepubescent boys I would think that would have been referred to in the (Judge's) remarks."

Elliott also points out that initially Klippert was charged with the now abolished offence of Contributing to Juvenile Delinquency. But that charge was withdrawn presumably because the Crown felt it lacked the evidence to get a conviction.

Kevin Allen heads the Calgary Gay History Project. He has done a lot of the original research on Klippert. "In the 50s and 60s it was always talk about corruption of our young boys and 'boys' of 21 were lumped into that when people talked about homosexuality." He has no definitive information on the age of Klippert's partners. But Allen does point to testimony by Court-appointed psychiatrists in a later trial who testified Klippert "denied having any preference for young men". At the time the age of consent for heterosexual acts was 14. Homosexual acts at any age were illegal.



"...there's no place for the state in the bedrooms of the nation."

Klippert was convicted on all counts and sentenced to four years in Prince Alberta Penitentiary in Saskatchewan. After his release he moved to Pine Point, NWT as a mechanic's helper. In 1965 he was questioned by the RCMP about a suspected arson.

They were satisfied he was not involved but in the course of the interview he voluntarily revealed four homosexual encounters. He was charged and convicted of gross indecency. He was sentenced to three years. However, the Crown was not satisfied and made an application for preventive detention, in other words an indefinite sentence, on the grounds Klippert was a dangerous sexual offender who had shown a failure to control his sexual impulses. The application was granted.

There were several unsuccessful appeals by Klippert and finally the matter landed before the Supreme Court of Canada. Brian Crane, a young lawyer at the time and still practicing today at 86, took the case *pro bono*. The Court split two to three and upheld the indefinite sentence. Crane recalls "the dissenters were more liberal, but when it came to the law the

majority was more of a black letter group". Writing for the majority Justice Fauteaux concluded "whether the criminal law, with respect to the sexual misconduct of the sort in which the appellant has indulged... should be changed... is not for us to say; our jurisdiction is to interpret and apply laws validly enacted."

The decision sparked an outpouring of media anger. The matter was raised in Parliament. Then-Justice Minister Pierre Elliott Trudeau famously mused "there's no place for the state in the bedrooms of the nation." By 1969, Trudeau was prime minister and an omnibus bill was passed which included the decriminalization of homosexuality.

Throughout it all, Klippert languished in the penitentiary and was not released until 1971. Elliott thinks the delay may have been the result of Klippert lacking legal counsel and not realizing after the passage of the bill he could apply for release.

When he was released Klippert moved to Edmonton where he ultimately married a woman. In spite of the way he had been treated by the law, Klippert avoided any involvement in what became a growing gay rights movement.

He died of kidney failure in 1996.

"The Everett Klippert case has always stuck in my craw," says Elliott, "I thought a terrible injustice was done to Mr Klippert. It always rankled me." 🍷

*A version of this article appeared in the October 2016 issue of Canadian Lawyer.*

"Pierre Elliott Trudeau": Chiloa derivative work: Jbarta (Pierre\_Elliott\_Trudeau.jpg) [CC BY-SA 3.0 (<http://creativecommons.org/licenses/by-sa/3.0/>)], via Wikimedia Commons

# BIG M DRUG: HOW A BICYCLE LOCK AND THE CHARTER CHANGED CANADA'S SUNDAYS

BY GEOFF ELLWAND

What is now a bustling 7-day-a-week ethnic supermarket in a shopping plaza in Calgary's gritty Forest Lawn neighbourhood was once Big M Drug Mart. In the early 1980s Big M became the focus of a fight over religion, freedom and commerce. It was a fight led by two determined storeowners who took their case all the way to the Supreme Court of Canada.

On a Sunday afternoon on May 30, 1982 events were to unfold in Big M that would not only influence Canadian law, but also lead to a fundamental change in Canadian society. At issue was the 74-year-old *Lord's Day Act* which severely restricted Sunday shopping and s. 2 (a) of the about-to-be-proclaimed *Charter of Rights and Freedoms* which guaranteed freedom of conscience and religion.

Under the law as it was then enforced, certain stores, such as pharmacies could be open on Sunday to provide necessities, drugs for example. But on that Sunday in Big M police, according to the facts of the case, "watched clerks sell groceries, plastic cups and a bicycle padlock" to customers. They charged the store under the 1906 *Lord's Day Act* which provided that upon conviction a retailer could be fined \$40. Some stores had been opening regularly on Sunday in Calgary and elsewhere and treating the fines as a cost of doing business. While the offence and the fine seem trivial, the mundane events in the store on Calgary's drab 8th Avenue SE were to engage some of the brightest legal minds of the day. It led to one of the first times the Supreme Court would rely on the *Charter* to resolve a difficult controversy. In its judgment the Court struck down the *Lord's Day Act* as being an unjustifiable infringement of the *Charter's* guarantee of freedom of religion. In doing so it would remind the country that as then-Justice Minister John Crosbie told the *Toronto Star* "we have to play by the new rules".

For generations the observance of the Christian Sabbath in Canada had sparked long, bitter debates and Sunday shopping was a particularly contentious part of that debate. Especially in the postwar period several commercial outlets went to court to try to crack the ban. One of the most determined efforts was in 1962, when two bowling alley operators in Hamilton, Walter Robertson and Fred Rosetanni opened their business in defiance of the law and fought the charge to the Supreme Court (*Robertson and Rosetanni v. R.* [1963] SCR 651). They relied largely on the guarantee of religious freedom found in s. 1 (c) of the *Canadian Bill of Rights*, the toothless predecessor of the

*Charter of Rights and Freedoms*. The majority of the Court with Justice John Cartwright dissenting, was not persuaded and Robertson and Rosetanni lost their case even though one of their lawyers was J.J. Robinette Q.C. a giant of the Ontario bar.

Big M was owned by two mid-twenties business partners who came to Calgary from Montreal, Michael Lasrado and Nancy Lockhart. Their lawyer Timothy Boyle, who still practises in Calgary, says the pair decided to engage in a long and expensive legal battle because "they both felt strongly on the basis of principle...[that] it just wasn't right...to use this archaic law to control commercial activity." Today, Nancy Lockhart who has gone on to successful careers in both business and the public sector in Ontario, says the fight was indeed a matter of principle but also of business survival. "Sunday" she recalls "was our busiest day." It was also a manifestation of youth. "Sometimes when you're young," she says, "you're ready to give it a shot. What you don't know, doesn't stop you."

Boyle was a junior in his law firm when Lasrado and Lockhart decided to fight the Sunday restrictions. He remembers his first appearance on the matter before the provincial court along with other stores who faced similar charges. "Large chains, big companies," he recalls in his downtown Calgary law office, "they all had their lawyers in three-piece suits and one by one they all cratered and pleaded guilty and paid the \$40 fine. At the end only the Big M was left standing to carry the challenge." While the lower court acquitted Big M it did not rely much on the new *Charter* but rather on an established constitutional division of powers argument.

When the case went to the Alberta Court of Appeal Boyle had to decide, "are we going to defend the provincial court decision or are we going to take an entirely different tack?" In other words, should he rely on the brand new *Charter*? That is exactly what Boyle chose to do. He based his position before the appeal court explicitly on the *Charter* and the guarantee of freedom of religion. In accepting that argument Justice J.H. Laycraft wrote in the majority judgment "sectarian observances shall neither be enforced nor forbidden".

The Crown appealed to the Supreme Court in what was now widely recognized as a crucially important case. Boyle remembers on the day of the Supreme Court hearing in Ottawa

"Supreme Court of Canada": Freemages.com/Sacha Leclair

# UNDER ARREST? NO LAWYER? WHO YOU GONNA CALL?

BY GEOFF ELLWAND

In 1990 the Supreme Court, ruled that police had improperly denied an Alberta man charged with second degree murder his 10(b) Charter right "to retain and instruct counsel without delay. So they upheld his acquittal at trial. The accused was Willam Brydges.

As a consequence all Canadian provinces now have an arrangement whereby a person under arrest can, if they choose, phone for free legal advice before being questioned by police. The 24-hour-a-day lawyers on the phone are called Brydges counsel.

In Saskatchewan, Alberta, BC and NWT the service is provided by each province's Legal Aid. The man with the contract to serve all four jurisdictions is the Saskatoon-born, Victoria lawyer, Ron Dumonceaux. He has contracts with about 25 lawyers throughout the region. Twenty-four hours a day, seven days a week, 364 days a year in as many as 112 languages, those lawyers, including Dumonceaux field about 50,000 calls from people under arrest who need immediate legal advice.

Dumonceaux accepted his first contract in 1992 while he was

still in Saskatoon. That initial contract was just for the province of Saskatchewan. He started out with a few other lawyers but for a time he was the only lawyer in the province answering the Brydges Counsel line. "Yeah, I had some long days" he recalls.

Over time he took on additional contracts in Alberta, British Columbia and NWT. He also joined a practice in Victoria. "It's relatively easy to do," he says of the Brydges work "but it's also relatively easy to screw up." He calculates he has testified more than a hundred times in cases in which questions have been raised relating to the advice given.

Suzanne Polkosnik, vice president of representational services at Legal Aid Alberta says the Brydges Counsel service is "critically important to providing justice to people who have been arrested and detained". While Polkosnik says "there is always room for improvement" with any service "we feel people are getting the advice they need, when they need it." 📞

*A version of this story first appeared in Canadian Lawyer in April 2014.*

*continued from page 18*

he had a cold and Ottawa was hit by "a terrible blizzard". But while conditions outside were frightful things inside, if not quite delightful, went pretty well for Boyle. He remembers that afterward he "had a good feeling about it." But he says preparing the case was difficult. It was one of the very first *Charter* cases to go before the Court and as a consequence "there was no jurisprudence. No decided cases. We started with a clean sheet." The Court unanimously found for Big M, though Justice Bertha Wilson wrote her own concurring judgment. In an 87-page majority judgment Chief Justice Brian Dickson memorably wrote: "If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on Sunday if I wish."

The Supreme Court judgment did not immediately result in wide-open Sunday shopping across the country. However, incrementally the force of the judgment saw provincial, territorial and municipal laws evolve resulting in the widespread modification or outright removal of Sunday closing laws.

University of Calgary constitutional expert, Professor Jennifer Koshan says *Big M* "has as much importance today as it did 30 years ago."

Naturally, Timothy Boyle looks back with some satisfaction on *Big M* and his role in winning the case for his clients, but there was one part of the experience that was not a success for Boyle. In the *Supreme Court Reports* his walk on Canada's legal stage is marred by a typographical error. In the counsel listings he appears not as Tim J Boyle, instead he is mistakenly recorded as Jim J Boyle. Today he says it is still annoys him, but he likes to think of it as the only mistake the Court made that day. 📞

*This is an update of a story that appeared originally in The Lawyers Weekly.*



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## HATE AND FREE SPEECH: A SUPREME BALANCING ACT

BY GEOFF ELLWAND

Jim Keegstra died in June 2014 at age 80. No cause of death was given but he suffered from a heart condition for a long time. He lived his last years in a small apartment with his wife in Red Deer. He remained bitter and unrepentant to the end.

In the 1980s Keegstra's name became synonymous not only with racial hatred but with the dissemination of that hatred. His actions touched off a sometimes emotional debate over the need to foster social harmony and racial justice while balancing the centrally important democratic principle of protecting freedom of expression. In the end the country turned to the Supreme Court of Canada for some sort of resolution and guidance on the issue.

Between 1978 and 1982, Keegstra was a social studies teacher at Eckville High School, near Red Deer. In the course of his teaching, as outlined in the majority judgment written by Chief Justice Brian Dickson and in contemporary newspaper reports, Keegstra regularly vilified the Jewish people and sought to inflame his students by presenting as historical fact accusations that Jews were "treacherous", and "sadistic". He claimed that Jews wished to destroy Christianity and were responsible for economic depressions, wars and revolution. He also asserted that the Holocaust was a hoax, supported by "trick photography". In class and on examinations he expected the students to repeat what he said. If they failed to do so, they lost marks. In December 1982 after repeated warnings, he was fired from his job.

In 1984 he was charged under what is now s. 319(2) of the *Criminal Code* with unlawfully promoting hatred of an identifiable group. He entered into a long string of court cases. He argued that s. 319(2) was an unjustifiable infringement of his freedom of expression as guaranteed in 2(b) of the *Charter*.

He lost in the lower court but in the Alberta Court of Appeal he won a unanimous judgment. The Appeal court found the hate speech section of the *Criminal Code* "fails adequately to respect free speech" and hence was of no force or effect. "There is a risk" the Alberta justices stated, "that prosecutions under this law which is designed to promote tolerance, might become a weapon of intolerance." The Crown appealed to the Supreme Court.


Keegstra's case heard by the Supreme Court in 1990 forced a difficult decision on the justices and deeply divided a body committed to both equality and free speech. In the end the court overturned the Alberta Court of Appeal by a narrow 4-3 decision, the majority finding that "...s. 319 (2) of the *Criminal Code* does not unduly impair the freedom of expression." It reached that conclusion, in part, by deciding that while the law limited the *Charter*-guaranteed freedom of speech, that limit was minimal and acceptable in a free and democratic society.

Evidence of the depth of the division in the court, and the recognition of the importance of the issues is demonstrated by the fact Brian Dickson delivered a 100-page majority judgement, one of the last he would write as Chief Justice.

Beverly McLachlin, who 10 years later would become chief justice, wrote a 70-page dissent in which she like Dickson wrestled with the difficult and delicate balance that must be struck between the defence of free speech and the desire to create a harmonious and fair society. She wrote "[t]he evil of hate propaganda is beyond doubt". But finally concluded the exact opposite of the majority. In McLachlin's view any benefit of the hate law legislation "is outweighed by the significant infringement of the constitutional guarantee of free expression". It has been observed that in Keegstra the majority decided there were some forms of free speech not worth protecting.

Keegstra's lawyer was Doug Christie of Victoria. Christie died in 2013. Until the end he remained passionate about what he viewed as his fight for freedom in Canada. The notoriety and enmity his controversial fight for freedom attracted, led him to board up the windows of his office because they were repeatedly smashed. He became the focus of unwanted attention because for over three decades he aggressively represented not only Keegstra but white supremacists, Holocaust deniers, Nazis and anti-Semites. Keegstra was just the first in Christie's long list of unpopular clients.

Christie was often accused of being not just an advocate for those he represented, but more of a fellow traveller in the world of Holocaust denial and racial hate. Christie asserted on several occasions that he did not necessarily embrace his clients' ideas but "I share one idea with them. They should be allowed to share their ideas." For Christie, Keegstra and many of his other cases were all about democracy, about the right to think and speak freely without state intervention. "It's the individual's right to say what they want" he insisted. It was his view, publicly at least, that the best constraint on hate speech is counter speech, not the courts or "various dubious human rights commissions".

Professor Lorraine Weinrib, from the University of Toronto law school has written on Keegstra. She doesn't share Christie's advocacy of wide-open free speech. "Speech is not the paramount right," she says. Professor Weinrib points to a long history of laws in Canada and the democratic world restricting speech including prohibitions against defamation, treason, the incitement of violence, and obscenity and even, though archaic, blasphemous libel (s. 297 of the *Criminal Code*). She believes that s. 319 (2) of the *Criminal Code* recognizes the importance of free speech and is narrow enough on the issue of hate speech that the restrictions are reasonable. In spite of the divided Supreme Court judgment, Professor Weinrib believes the Keegstra case remains very important. She calls the judgment "well wrought" and says it remains a guide to the entire legal system in dealing with hate speech issues. She points to its frequent citation in the courts. "Keegstra," she says "seems to have a good shelf life." 

*A version of this story first appeared in The Lawyers Weekly in the spring of 2011.*

# BRE-X: THE CALGARY-BASED STOCK SCANDAL STILL MAKING HEADLINES 20 YEARS LATER

BY GEOFF ELLWAND

In March 1996, a prominent stockbroker told the Edmonton Journal Bre-X is "the Cinderella stock of the century."

And it was.

Bre-X, a Calgary-based junior mining company led by David Gordon Walsh, reported its geologists had discovered incredibly rich gold deposits deep in the Indonesian jungle.

Six years before in 1989, Bre-X started on the Alberta Stock Exchange at 30 cents a share, by early 1996 Bre-X was trading at above \$280 per share. A lot of people became paper millionaires, and those who were lucky or smart enough to cash-in reaped staggering rewards.

But just like in the story of Cinderella, midnight struck.

By March 1997 the euphoria, and the dollars, began to vanish and there was no Prince Charming to make things right. The precipitous tumble began when the geologist who "discovered" the gold deposit, Michael de Guzman, fell out of a helicopter near the site. It took five days to find the body which had been ravaged by jungle animals and was hard to identify. De Guzman had gone to the site directly from a miners' conference in Toronto at which Bre-X's chief geologist, John Felderhof had been named "Canada's Prospector of the Year". At about the same time Felderhof was receiving his accolades he was also receiving reports from independent geologists hired to confirm de Guzman's discovery. Those independent reports indicated only "insignificant amounts of gold were found". That is why de Guzman was dispatched to Indonesia and that may be why he fell out of the helicopter.

In May 1997 facing eight lawsuits and an RCMP investigation, Bre-X sought and obtained protection under the Companies' Creditors Arrangement Act. By November 1997, Deloitte & Touche Inc were appointed as Trustees in Bankruptcy of Bre-X Minerals Ltd. Two weeks before that, Calgary-based Larry B. Robinson was one of the lawyers retained to act for Deloitte. Robinson is now retired but he recalls a few days after the bankruptcy was announced he visited Bre-X's four-storey brick office building on the edge of Kensington across the river from downtown Calgary. For weeks the building had been besieged by the media, distraught shareholders and investigators. But it was now closed. "I went there just to look around. It was just an ordinary office." He says he did the same thing with other bankruptcies he handled. "I just liked to get a feel for the places."

Robinson remembers Calgary as being "quite exciting at the time, oil was booming, people had lots of money." But for him the Bre-X story is a tragic one. "Not because of what happened to the principals" he points out "but it was tragic because of what happened to the shareholders and the creditors." The Deloitte

operation to recover whatever assets could be gathered involved "a wide-ranging, no-holds barred effort," Robinson remembers. Private investigators were involved. As part of the recovery campaign Robinson appeared in court not only in Canada but also in the Philippines. Deloitte brought other court actions in the Cayman Islands and elsewhere.

But Deloitte's extensive efforts proved largely fruitless. No one was ever criminally charged in the affair and only a fraction of the funds were ever recovered.

In 1998, while the many matters surrounding Bre-X were still before the courts, Walsh died. He had moved to the Bahamas with his wife and suffered a brain aneurysm. He was 52. His Toronto lawyer, Alan J. Lenczner told The New York Times Walsh "always viewed himself as a victim along with everyone else." Lenczner said Walsh, "claimed he had nothing to do with the tampering nor could he have known about it."

The third man in the Bre-X scandal was the chief geologist John Felderhof. He was a fearless prospector who had operated in some of the toughest jungles and deserts in the world. When still in his 20s he played a key role in the discovery of a huge copper-gold deposit in Papua New Guinea. It was Felderhof who introduced de Guzman to Walsh and Bre-X. After spending years in court Felderhof was, in 2007, finally acquitted on all charges and has since retired to an island in the Philippines where, according to The Northern Miner he lives modestly running a small lunch counter and convenience store

In the Bre-X scandal millions of dollars were made and millions lost. There were inquiries and police investigations but in the end no one was convicted of anything and the civil actions were abandoned because there was almost no money left.

But there are some things that mark the Bre-X scandal as an especially Canadian story. First of all, Hollywood has just made a movie based on the case but, of course it is set in the United States. Secondly, twenty years on, the only person in anyway linked to Bre-X who is still before the courts is Toronto securities lawyer Joe Groia. He successfully defended Felderhof in a lengthy and often acrimonious series of hearings before the Ontario Securities Commission on insider trading allegations and other securities matters. But Groia – now Felderhof's former lawyer – expects to appear before the Supreme Court of Canada later this year essentially because, it is alleged by the Law Society of Upper Canada, that during the Felderhof hearings he was rude! 🗣️

*A version of this story appeared in Canadian Lawyer in April 2017.*

"Indonesia": Freemages.com/y0s1a



# FRONT AND CENTRE

## 2016-17 VOLUNTEER APPRECIATION

### CALGARY: MAY 25



CBA Section Chairs, Committee Chairs, Council Members, Past Presidents and Executive Committee members enjoy the 2016-17 Volunteer Appreciation reception in Calgary.



CBA Alberta Vice President Jenny McMordie makes a presentation to outgoing Section Coordinator Sean FitzGerald

### PBLA 10<sup>TH</sup> ANNIVERSARY



Kevin Feth, QC and the Hon. Justice Rod Jerke were the keynote speakers at the PBLA 10th Anniversary events in Edmonton & Calgary, respectively

### EDMONTON: JUNE 19



CBA Section Chairs, Committee Chairs, Council Members, Past Presidents and Executive Committee members enjoy the 2016-17 Volunteer Appreciation reception in Edmonton.



CBA Alberta President Jeremiah Kowalchuk and outgoing Section Coordinator the Hon. Madam Justice Bonnie Bokenfohr



CBA Alberta President Jeremiah Kowalchuk and outgoing Section Coordinator David Hiebert



## CBA NATIONAL VICE PRESIDENT



Raymond Adlington, a tax law specialist with McInnes Cooper in Halifax, has been elected CBA National Vice President. Voters in this election were the 2016-17 Board of Directors, the National Section Chairs and the National Forum Chairs.

Three members of the 2017-18 Board came forward as candidates for the vice-presidential position. The other two were Jeff Howe, an aboriginal and treaty law specialist and sole proprietor in Saskatchewan, and Marie Laure Leclercq, who specializes in intellectual property and commercial law as counsel with De Grandpré Chait in Montreal.

The [lineup for the 2017-18 Board](#) is now complete. The new Board will take over on September 1, and oversee the transition to the new CBA governance model.

## SPOTLIGHT ON THE ANNUAL MEETING



While normally at this time of year CBA members and staff would be gearing up for a CBA Legal Conference and Council meeting taking place over several days, this year will feature an Annual Meeting to transition to our new governance model – a meeting that will take less than an afternoon.

The business traditionally dealt with by Council will be compressed into a no-nonsense, tightly paced 2 ½-hour meeting on August 17.

This year members will be asked to consider just [three resolutions](#), with the first – the new CBA bylaws – being of primary importance. The other two, from the Children's Law Committee and SOGIC, will be addressed if there is time. The new Board of Directors will be looking at other ways to bring resolutions to the membership for consideration, more than just once a year at the Annual Meeting.

The members who will vote on the resolutions will be those attending the meeting in person, as well as those participating at hubs set up across the country. The Alberta Branch's hubs are located at the CBA offices in Calgary and Edmonton. Scrutineers in each location will make sure that the members in attendance there are eligible to vote.

All of the meeting materials and other relevant information can be found on the [cba.org](#) website.

## UPDATE ON CBA INTERVENTIONS

The Supreme Court has given the CBA leave to intervene in *Groia*. A team from Norton Rose led by Pierre Bienvenu acts for the CBA. The CBA has also filed its application for leave to intervene at the Supreme Court in two appeals relating to TWU. All three appeals will be heard in November.

## MEMBERSHIP RENEWAL

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There is no better time to renew your CBA membership. Our industry is undergoing profound change, and the opportunities ahead are exciting. Together, we hold the key to meeting the challenges to come.

Your membership renewal is a commitment to your career and your profession. It is a reminder that you belong to something big, and something that matters. As a CBA member, you have countless opportunities to grow real and meaningful connections with your colleagues across the country. Our members represent the very best of Canada's legal community.

A reminder for all members to take advantage of the Portfolio and Portfolio Plus packages that are available to enhance your membership. These packages provide members with education credits, free materials-level membership to Alberta Branch Sections, and rebates on eligible CBA purchases.

For more information on CBA membership renewal, and the benefits available to Alberta members, visit [www.cba.org/Membership/Why-Renew/AB](http://www.cba.org/Membership/Why-Renew/AB).

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## NORTH

Hope everyone is enjoying their summer.

We had a successful conclusion to the section season (and a great start to next year's season) with the Section Executive Workshop on May 31, 2017. Thank you to all of the section executive members who came out to participate. It was good to see such a good turnout, both in terms of sections and executive members of those sections. If you have any comments or suggestions arising out of the workshop, please feel free to let us know, as we are always trying to improve on the support that we provide for the various sections.

### Meeting Information

While the start of section meetings is still a little while off, this is also a convenient time to remind that, with certain operational changes it is all the more important for section executives to have their meeting information sent to the CBA Section Registrar in advance of the meeting, so that this information can be disseminated to our members in a timely manner. Data compiled for previous meetings has shown a relationship between turnout and the notice provided in advance of a section meeting, so don't wait until the last minute to provide the CBA Section Registrar with your meeting information. This will not only make life easier for our hard working staff, but will also result in our gratitude for helping to make the meeting process run smoother.

## FROM THE DESKS OF DAVID J. HIEBERT AND KYLE KAWANAMI

### CBA West

A reminder that CBA West will be taking place in Nevada, Las Vegas November 17-19, 2017. Rub shoulders with your counterparts from across Alberta and British Columbia while taking in what promises to be a dynamic and interesting conference. Further information about CBA West can be found at [www.cba-west.org](http://www.cba-west.org).

I'd also like to take this opportunity to thank David Hiebert for the hard work and dedication that he has put into the role of section coordinator, and wish him luck in his new role as Secretary for the CBA Alberta. Amanda Lindberg will be the new fellow coordinator and we will be looking to personally introduce ourselves to as many meetings and sections as we can once meetings start up again in September. 🗨️



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



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

## SOUTH

In the course of celebrating Canada's 150th birthday, we want to take the opportunity to thank every person that has contributed to the breadth and diversity of our 41 CBA Sections in southern Alberta. This especially includes the members of the Section Executive Committees, who have spent considerable time striving to design and coordinate worthwhile programs for their Section members, all of the individuals that have volunteered to speak or present at the hundreds of Section meetings each year, and all of the very hardworking staff at the CBA office that facilitate every event we have. Most importantly, we want to thank all of our fellow CBA members that have participated in the Sections. There are many forums available for professional development and networking, so our success today is truly based on the ongoing participation of our CBA members. Thank you, please continue to participate in our Sections, and please provide us with feedback whenever you can.

Now with the summer upon us, in addition to some vacation time for (hopefully!) all of us, this can be an opportune time to reflect on our professional development needs for the coming year. To that end, we hope the CBA section will continue to play an important role. This could mean you continue to participate in your regular Sections, experiment with attending or joining a new section, volunteer your time to speak, or seek to participate on a Section Executive Committee. For more information, please see the link to Alberta South

## FROM THE DESKS OF ANDREW BATEMAN AND SEAN FITZGERALD

Sections at [www.cba-alberta.org](http://www.cba-alberta.org), or send us an email at [sections@cba-alberta.org](mailto:sections@cba-alberta.org).

We would like to remind everyone that Section registration will open for the 2017-18 year in mid-August. Keep an eye out for an email from CBA Alberta, which will have all the details you need to register for your preferred sections.

As a final note, we would like to express our gratitude to Sean FitzGerald for completing his second term as CBA Section Coordinator. Sean is very dedicated to his pursuits at the CBA, and is a pleasure to work with. We welcome Bianca Kratt who will be joining Andrew Bateman as a section coordinator for the coming year.

We look forward to seeing all of you back in the fall. 🗨️



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



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

# WHY A CENTURIES-OLD LEGAL PROFESSION IS TIMELESS AND LOVEABLE TO ITS PRACTITIONERS

BY C.J. SHAW, QC

Workroom, courtroom, boardroom, classroom—practitioners enjoy doing and talking law.

Fortunately, the language of our law isn't Latin. The heyday of Latin phrases in our law was the nineteenth century (the 1800s) back when lawyers and judges had knowledge ("information and skills acquired through experience or education"<sup>1</sup>) of Latin. Use of Latin phrases has been in decline since at least the 1920s for good reasons—primarily problems with pronunciation.<sup>2</sup> Anyway Latin was for the church—not the public.

Learning (through instruction, study, experience) is usually a precondition to being knowledgeable. Few reported sightings of a law prodigy.

## Skill

Recall the venerable adage "a lawyer's time and advice are his [or her] stock in trade."<sup>3</sup> Anybody who assumes the same legal services performed by different lawyers are fungible (like hydrocarbon molecules in a pipeline) is living in a fool's paradise. A competence scale of good, better, best is realistic. Reportage that all lawyers are created equal would be "false news!" Equal opportunity not equal outcomes is a reality of law school education. Great practical experience and continuing professional development (CPD) containing "significant substantive, technical, practical or intellectual content"<sup>4</sup> raise lawyer competence.

Michael Thomas' novel *Someone Else's Money*<sup>5</sup> is satire about self-interest, greed and a U.S. financial market meltdown. It "reverberates with a love of art history"<sup>6</sup>—a good read. Anyway Thomas refers to a fictional character as a "client's lawyer."<sup>7</sup> It then reads "he never went further with a declaration of principle than the first trace of a client's frown."<sup>8</sup> A lawyer doesn't exercise legal skill (e.g. objectivity) by rubber-stamping something for a fee, to wit, only telling the client what the client wants to hear and not telling the client what the client needs to hear.<sup>9</sup>

Recall the lawyer's role as problem-solver is an amalgam of advocate and counsel (or advisor<sup>10</sup>). Lawyer as advocate, with a duty of loyalty to the client and acting ethically, promotes the client's position. Lawyer as counsel advises on any weakness in the client's position and suggests alternatives to achieve a result beneficial to the client.<sup>11</sup> Ideally, lawyer as advocate and lawyer as counsel (or advisor) is the same person.

But lawyers aren't automatons. Using technology for efficiency doesn't abrogate legal professionalism (e.g. enthusiasm, pride in work, scholarship). Fear personal technology addiction (e.g. obsessive smartphoning—the device in your hand; always in your hand).

<sup>1</sup> *Concise Oxford English Dictionary*, 12th ed, s.v. "knowledge".

<sup>2</sup> Stephen Waddams, *Introduction to the Study of Law*, 8th ed (Toronto: Carswell, 2016) at 38-40.

<sup>3</sup> Attributed to Abraham Lincoln (and mostly by law memorabilia vendors, e.g. CafePress Inc., online: <http://www.cafepress.ca/+abraham-lincoln-a-lawyers-time-and-advice-are-his-stock-in-trade+gifts>).

<sup>4</sup> Law Society of Alberta, *The Rules of the Law Society of Alberta*, r 67.1(2), (June 10, 2017), online: Law Society of Alberta <https://dvbat5id7ib.cloudfront.net/wp-content/uploads/2017/01/04144612/Rules.pdf>

<sup>5</sup> Michael M Thomas, *Someone Else's Money* (New York: Simon & Schuster, 1982).

<sup>6</sup> *Ibid* at 510.

<sup>7</sup> *Ibid* at 372.

<sup>8</sup> *Ibid*.

<sup>9</sup> Margaret McCallum, Deborah A Schmedemann & Christina L Kunz, *Synthesis: Legal Reading, Reasoning and Writing in Canada* (Toronto: CCH Canadian, 2003) at 122.

<sup>10</sup> *Ibid* at 1-3.

<sup>11</sup> Melvin I Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009) at 47-48.



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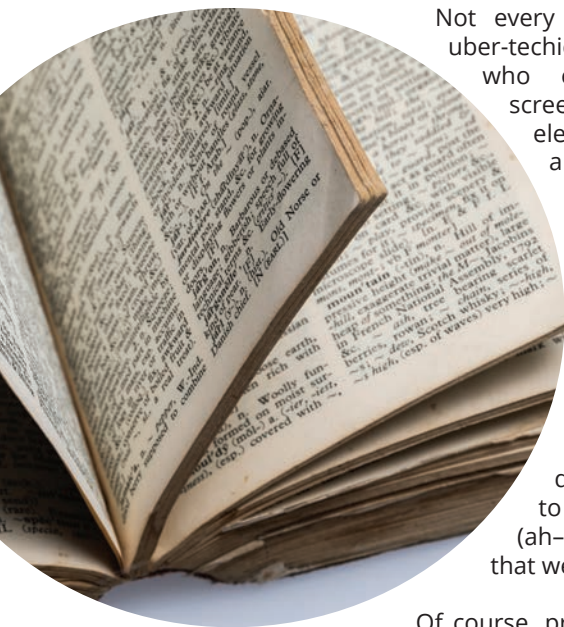
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Not every lawyer will be an uber-techie. And a lawyer who eschews excessive screen time on an electronic device isn't a Neanderthal. Albeit in biochemistry a small amount of Neanderthal DNA (deoxyribonucleic acid) is present in some modern humans.<sup>12</sup> Anyway there's no clamour for a return to coal-fired Gestetner duplicating machines to print hard copies (ah—the good old days that weren't).

Of course, practitioners strive to write (and speak) with “clarity, simplicity and brevity.”<sup>13</sup> The greatest physicist of the twentieth century (the 1900s) supposedly said, “If you can't explain it simply, you don't understand it well enough.”<sup>14</sup>

Practitioners experiment with the English language—word usage. Ideally, a practitioner acquires a satisfactory and identifiable writing style—“the sound his [or her] words make on paper.”<sup>15</sup>

Practitioners develop a strong working knowledge of legal citation, writing and editing, bricks and mortar libraries (including law), online research sources, and a good dictionary.<sup>16</sup> Preferably an Oxford or Merriam-Webster for the ordinary meaning of an important word in an enactment (statute or regulation) or a document (and for when writing an article). An important word is any word used for an important purpose. A good dictionary may include a mini-guide for correct grammar and plain English.<sup>17</sup> Spellcheck definitely isn't a dictionary.

And it's not fail-safe to prevent misuse of words (e.g. near-homonyms<sup>18</sup> like affect and effect, allusion and illusion, eminent and imminent<sup>19</sup>). Google can help when researching the meaning or usage of certain words and phrases. A well-prepared Definitions or Interpretation section in an enactment or a document is a handy practical resource when doing legal work involving that enactment or document. The relevant Interpretation Act can be useful concerning an enactment.

Practitioners are pragmatists. According to Oxford “pragmatic” means “dealing with things in a way that is based on practical rather than theoretical considerations.”<sup>20</sup> And “pragmatism” in philosophy is defined as “an approach that evaluates theories or beliefs in terms of the success of their practical application.”<sup>21</sup>

But practitioners are foremost equity lawyers. Our superior courts of law also dispense equity. Equity is only dispensed in the court's discretion. It is available to prevent gaps in the law and procedure. Equity provides for fairness or natural justice. Equity can be invoked “in the special circumstances of particular cases”<sup>22</sup> (and to maintain public confidence in our judiciary). If there is a conflict between legal rules and equity, equity is to prevail. Where the law is clear on a matter (no conflict with equity) a court must apply the law even if the result seems harsh<sup>23</sup> (or change that law—may require legislative action<sup>24</sup>). Recall the maxim “Equity follows the law.”<sup>25</sup> Knowing the role of equity face to face with law is an asset when researching the legal meaning of a situation—ask what can the court realistically be expected to do?

## Doctrine

Doctrinal knowledge is the antidote for the disheartening expression “you don't know what you don't know.” Broadly stated, legal doctrine is the rules of law (and associated legal principles, case law, enactments). Legislation usually lags the judge-made law.

Our legal doctrine took centuries to build. The classical vocations (or callings) since antiquity (law, medicine, theology) are about applying specialized knowledge to real cases.

<sup>12</sup> Anne McIlroy, “Humans carry Neanderthal DNA, researchers find” *The Globe and Mail* (6 May 2010), online: *The Globe and Mail* [www.theglobeandmail.com](http://www.theglobeandmail.com) [Canada's newspaper of record]. And see Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Toronto: McClelland & Stewart, 2014) at 15-16.

<sup>13</sup> Waddams, *supra* note 2 at 35.

<sup>14</sup> Albert Einstein. BrainyQuote.com, Xplore Inc, 2017, online: <https://www.brainyquote.com/quotes/quotes/a/alberteins383803.html>, accessed May 24, 2017.

<sup>15</sup> William Strunk Jr & EB White, *The Elements of Style*, 4th ed (New York: Longman, 2000) at 66-69.

<sup>16</sup> Of course, a good dictionary needn't only be the venerable *Oxford English Dictionary* (OED). See Simon Winchester, *The Professor and the Madman: A Tale of Murder, Insanity, and the Making of the Oxford English Dictionary* (New York: HarperCollins, 1998) for a fascinating and quirky history of the OED. Look forward to accessing the next edition of the OED by electronic subscription only. See Alastair Jamieson, “Oxford English Dictionary ‘will not be printed again’” *The Telegraph* (29 August 2010), online: <http://www.telegraph.co.uk/>; Padraic Flanagan, “RIP for OED as world's finest dictionary goes out of print” *The Telegraph* (20 April 2014), online: <http://www.telegraph.co.uk/>.

<sup>17</sup> e.g. “Guide to Good English” in *Concise Oxford English Dictionary*, 11th ed, at 1701-1708 [not in current 12th ed]; “A Handbook of Style” in *Merriam-Webster's Collegiate Dictionary*, 10th ed, [an American publication] at 1535-1557 [less content in current 11th ed].

<sup>18</sup> Recall a “homonym” is “a word having the same spelling or sound as another but a different meaning.” See Jeremy Butterfield, ed, *Fowler's Dictionary of Modern English Usage*, 4th ed (Oxford: Oxford University Press, 2015) s.v. “homonym”.

<sup>19</sup> *Ibid* s.v. “homophone”. And see Canada, *The Canadian Style: A Guide to Writing and Editing*, rev and exp ed (Toronto: Dundurn Press, 1997) at 55-57.

<sup>20</sup> *Concise Oxford English Dictionary*, 12th ed, s.v. “pragmatic”.

<sup>21</sup> *Ibid* s.v. “pragmatism”.

<sup>22</sup> JH Baker, *An Introduction to English Legal History*, 4th ed (Oxford: Oxford University Press, 2004) at 202-204.

<sup>23</sup> See *Guest, Re (Bankruptcy)*, 2002 SKQB 483 [Guest] where a specially equipped Chevrolet van used by a quadriplegic in volunteer work helping disabled individuals was not exempt from seizure by creditors. *The Exemptions Act*, R.S.S. 1978, c E-14, s 2(1) exempted “one motor vehicle where it is necessary for the proper and efficient conduct of the execution debtor's **business, trade, calling or profession**.” (Emphasis added.) The jurisprudence (case law) considered by the Registrar in Bankruptcy made it clear the van was not exempt property.

<sup>24</sup> After the sad result in *Guest*, *ibid*, Saskatchewan's current exemptions law *The Enforcement of Money Judgments Act*, S.S. 2010, c E-9.22, s 93(1) (e) reads “one motor vehicle with a value that does not exceed the prescribed [by regulation] amount.” The exemption is not tied to a debtor's business, trade, calling or profession.

<sup>25</sup> *Osborn's Concise Law Dictionary*, 12th ed, s.v. “equity, maxims of”.

# DOCTRINAL LEARNING

A perennial law learning objective is being able to critique (do "detailed analysis and assessment"<sup>26</sup> of) the facts to: (a) state the problem, (b) determine the solution, and (c) achieve a specific law result.

Learning legal doctrine is fun-entertaining and enjoyable. It's flex-time friendly for self-directed learning, and to reflect on ("think deeply or carefully about"<sup>27</sup>) the law learned.

Doctrinal law is omnipresent and accessible. It's thriving in law schools, courts, private practices, corporate legal departments, CPD programs, by self-study, and elsewhere.

Acquiring doctrinal knowledge propels curiosity ("a strong desire to know or learn something"<sup>28</sup>) and its close relation creativity ("the ability to create something from nothing or something new from long-held beliefs"<sup>29</sup>). And doctrinal knowledge plus analysis is a prerequisite for creativity.<sup>30</sup>

WARNING – progressing from law enthusiast to grounded ("well balanced and sensible"<sup>31</sup>) practitioner, or jurist (law expert in a legal speciality or practice area) may cause mild euphoria.

Possessing doctrinal knowledge in significant quantity begets polite self-confidence.

Practitioners who acquire superior knowledge of doctrinal law are admired by legal colleagues and others. This respect persists concurrent with the latest in pedagogy or a new electronic gadget being touted as hope for fixing legal education and saving our (750 years old<sup>32</sup>) legal profession.

## Ergo

"Thinking like a lawyer"<sup>33</sup> isn't vanishing. It has great elegance and sophistication (and the gene for exceptional longevity).

Don't stop believin'  
Hold on [Calgary to you]...feelin'<sup>34</sup>

<sup>26</sup> *Concise Oxford English Dictionary*, 12th ed, s.v. "critique".

<sup>27</sup> *Ibid* s.v. "reflect".

<sup>28</sup> *Ibid* s.v. "curiosity".

<sup>29</sup> Catherine Yang, "Chaos, inspiration, and the creation of creativity" *Epoch Times* [Alberta Edition] (19-25 May 2017), online: *Epoch Times* [www.TheEpochTimes.com/](http://www.TheEpochTimes.com/).

<sup>30</sup> Peter F Drucker, *Management: Tasks, Responsibilities, Practices* (New York: Harper & Row, 1974) at 267-268.

<sup>31</sup> *Concise Oxford English Dictionary*, 12th ed, s.v. "grounded".

<sup>32</sup> Baker, *supra* note 22 at 156-157.

<sup>33</sup> McCallum, *supra* note 9 at xvii, 7.

<sup>34</sup> Journey. "Don't Stop Believin'." By Steve Perry, Jonathan Cain, Neal Schon. Escape. Columbia, 1981. LP. Unofficial anthem for San Francisco Giants' 2010 postseason and World Series that Giants won.

"Dictionary": iStockPhoto.com/GCShutter



**C. J. SHAW, QC LLM**, born and raised in north-east Nova Scotia (46° 11' 48.9084" N 59° 57' 25.2144" W), is a Dalhousie lawyer committed to contributing (and earning a living) in the Alberta legal community. He is a member of the CBA Alberta Legislation and Law Reform Committee.



# ADR CHAMBERS



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# A VIEW FROM THE BENCH

BY THE HONOURABLE JUDGE A.A. FRADSHAM

I understand that one of the great strengths of the English language is that it is constantly expanding to accommodate an ever changing world, and that it welcomes new words from other languages. However, sometimes I wonder if the language might not benefit from something equivalent to the Académie Française which protects (peut-être a wee bit too much) the purity of the French language.

In my view, too many people succumb to the temptation to take a noun and, by some sort of linguistic alchemy, make it into a verb.

I recall hearing a witness tell me that he and the accused (charged with fraud) had shared office space. Except, he did not say that; rather, he said, "[The accused] and I officed together." The witness should have been charged with linguistic assault.

Recently, I have heard business commentators utter statements such as: "This subsidy will incentivise people to invest in..." I concede that "incentivise" (or "incentivize" for those living south of the 49th parallel who, as a people, are to spelling what new math is to arithmetic) is recognized by no less an authority than The Oxford English Dictionary. However, I submit that such recognition is evidence in support of my thesis: our worries about biological GMOs should be expanded to the ever growing number of linguistic GMOs. "Incentive" is a lovely, calm noun; please do not make it into a mutant verbal creation breaking loose from some language laboratory operated by an evil descendant of Dr. Frankenstein.

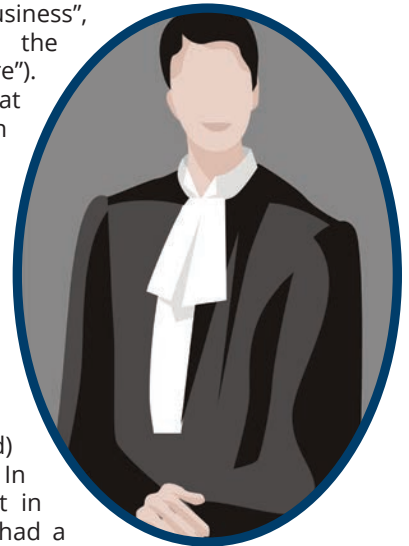
Shakespeare's Hamlet instructed his actors to "speak the speech...trippingly on the tongue"; words such as "incentivise" stumble and lurch about before falling from one's mouth in a disheveled heap.

I might add that I similarly railed against such now common

terms as "grow the business", and "going forward" (when the person means "in the future"). I suffered ignominious defeat in those battles; I am certain no one even heard my anguished cries of dismay. Indeed, I was prepared to permanently abandon my Quixotic campaign. Or, to put it another way: I decided that, going forward, I would abandonise my Quixoticisations.

Then I was slapped (slapptified) with a new affrontification. In a recent Pre-Sentence Report in relation to an offender who had a criminal record, I read that he had "recidivated". "No", I exclaimed, though to no one in particular, and I confess it concerns the near-by judicial assistants when I do that. "This cannot be!"

Off I went to the OED...and there it was! "Recidivate (verb intransitive): to fall back, relapse." I did take some comfort in the notation that "recidivate" is "obscure, rare". I suppose the author of the Pre-Sentence Report was simply "going backward" and, upon doing so, found the word "recidivated" officing with all the other words in the OED. ☞



**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.

## JUDICIAL UPDATES

### COURT OF APPEAL OF ALBERTA

**The Hon. Madam Justice M.S. Paperny** (Calgary) has elected to become a supernumerary judge, effective June 30, 2017.

### COURT OF QUEEN'S BENCH OF ALBERTA

**The Hon. N.C. Wittman, Chief Justice**, retired effective May 1, 2017.

**Janice R. Ashcroft, QC**, has been appointed as a justice of the Court of Queen's Bench of Alberta in Calgary, effective June 23, 2017.

**The Hon. Mr. Justice A.G. Park** (Calgary), retired as a supernumerary justice, effective June 25, 2017.

**The Hon. Mr. Justice G.C. Hawco** (Calgary) has retired as a supernumerary justice effective July 31, 2017.

### PROVINCIAL COURT OF ALBERTA

Part-time **Justice of the Peace J.L. Schwager** (Calgary) resigned effective April 30, 2017.

**Fatima Airth** (former full-time Justice of the Peace) has been appointed as a Provincial Court Judge (Calgary Family & Youth), effective May 9, 2017.

**Joshua B. Hawkes, QC**, has been appointed as a Provincial Court Judge (Calgary Criminal), effective May 9, 2017.

**Margaret M. Keelaghan, QC**, has been appointed as a Provincial Court Judge (Calgary Criminal/Calgary Region), effective May 9, 2017.

**Judge Jacqueline E. Schaffter** (Edmonton) has been designated as Assistant Chief Judge of the Edmonton Region, effective May 30, 2017, for a term of 5 years.

**Judge Patrick M. McIlhargey** (Calgary) has elected to become a supernumerary judge, effective June 3, 2017.

**Judge J. Bradford Kerby** (Edmonton) has elected to become a part-time judge, effective June 20, 2017.

Part-Time **Justice of the Peace S.J. Taylor** (Calgary) resigned effective June 30, 2017.

Part-time **Justice of the Peace D.M.L. Hanly** (Calgary) has been designated as full-time effective August 1, 2017.



**WILL SEARCH.** The Public Trustee of Alberta is seeking the will for Daisy Gilewich, late of Calgary. Please contact direct: **403-297-7149 or mail: 900, 444 - 7 Ave SW, Calgary AB T2P 0X8.**

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**WILL SEARCH.** Michael John Steblyk, born 11/01/58 in Vegreville Alberta, died 05/13/17 in St. Albert, Alberta. Contact [hdsteblyk@shaw.ca](mailto:hdsteblyk@shaw.ca).

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**ALBERTA LAW REFORM INSTITUTE.** The Alberta Law Reform Institute [ALRI] is accepting applications for two Board positions for members at large. ALRI is entering its 50th year of advancing just and effective laws for Albertans. The Board meets for one full day per month to discuss proposals for law reform and provide governance. Most meetings are by video conference from Edmonton or Calgary with some held in person. The anticipated time commitment is 50-80 hours per year. Board members may also serve on a variety of sub-committees. More information about this opportunity is on our website at [bit.ly/2v446hp](http://bit.ly/2v446hp).

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