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LAW MATTERS

Farewell Issue

Reflections from Past Editors

Key Articles Through the Years

Unsung Hero: Lulu Tinarwo

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITORS' **NOTE**

BY **JESSICA ROBERTSHAW** & **JOSHUA SEALY-HARRINGTON**

Over the last few years, *Law Matters* has strived to keep up with changing tides. In this respect, our focus was often on *content* — that is, what topics we cover. But our focus must also consider *medium* — that is, *how* we cover those topics. We have loved gracing the desks of lawyers across Alberta for so many years. But, in this digital age, we simply cannot wait 3 months to engage with controversial issues. Further, fewer and fewer people are doing their reading in print. With both of these concerns in mind, this edition of *Law Matters* will be the last of our paper publications as we move the magazine to an entirely digital platform, which can be found at www.nationalmagazine.ca/lawmatters. This change has prompted reflection, for us, on how *Law Matters* has evolved over the years and how it has often been an advocate for social progress, a voice for influential legal analysis, and a way for the legal community to learn about and remember their colleagues and their accomplishments.

In celebrating what *Law Matters* has become, this "Farewell" edition is retrospective, looking back over the last 5 years and highlighting some of the critical conversations we have explored. Indeed, after going back through prior editions, one thing became immediately apparent: not only have we covered some crucial issues, but further, those issues persist as central controversies occupying the hearts and minds of people across Alberta — and the world.

From our summer 2015 edition — ***The Trinity Western University Debate*** — we include an article by Professor Jennifer Koshan and now Justice Alice Woolley entitled *Trinity Western University Law School Equality Rights, Freedom of Religion and the Training of Canadian Lawyers*. This detailed analysis took a controversy that divided many, and delicately framed the issues at stake.

From our summer 2016 edition — ***Sex Drugs and Assisted Dying: How free should we be?*** — we include Dr. Ummni Khan's article entitled *Hot for Kink, Bothered by the Law: BDSM and the Right to Autonomy*. Dr. Khan's insightful article informed not only our readers, but the Supreme Court of Canada! Indeed, in a *Law Matters* first, Dr. Khan's piece was cited by the Court in *R v Goldfinch*, 2019 SCC 38 at para 185.

From our fall 2019 edition — ***#MeToo and the Law*** — we include Dr. Tuulia Law's piece entitled *Me Too: The Return of the Victim?* which complicated the narratives we bring to our conversations about gender and sexual justice, during what remains an ongoing societal reckoning.

From our spring 2020 edition — ***Climate Change and Justice*** — we include Ricki-Lee Gerbrandt's article entitled *Alberta Court of Appeal makes Bold Changes to Constitutional Law Doctrine in the Greenhouse Gas Pollution Pricing Act Reference*. Ms. Gerbrandt's analysis laid out a clear framework for a complex case that is now destined for the Supreme Court.

Lastly, we include three articles on Indigenous justice to reflect not only *Law Matters*' commitment to platforming these critical issues, but also, to illustrate how important it is to remain vigilant in advocating for Indigenous rights. Reaching 19 years back to our August 2001 edition of *Law Matters*, we include Fred Fenwick's review of *A Feather not a Gavel, working towards Aboriginal Justice* by the Honourable A.C. Hamilton Q.C., LL.D. Then, from our fall 2017 edition — ***Truth and Reconciliation*** — we include Koren Lighting Earle's article entitled *Law Society of Alberta responds to Truth and Reconciliation Calls to Action*, which provided an outline of the steps the Law Society of Alberta was taking to ensure that Indigenous lawyers know they have a place at the Law Society and as a part of the profession. Lastly, from our spring 2018 edition — ***Indigenous Victims and Criminal Justice*** — we include Professor Naiomi Metallic's article, *I am a Mi'Kmaq Lawyer, and I despair over Colten Boushie*, a powerful essay exploring the persisting force of racism in our society.

Law Matters would never have developed into the publication that it is today without the dedicated work of so many volunteers over the years, including past editors, contributors, and CBA staff. With that in mind, we have also included remarks from past editors, who reflect on their time with *Law Matters*, and what its legacy means to them. And as a special treat, we also include one last "View from the Bench" by Justice Fradsham, in honour of his former column.

Finally — and now this is just Jessica writing — this is the last edition that will see Joshua Sealy Harrington at the helm as one of our Co-Editors in Chief. Josh has been heavily involved with *Law Matters* for the past five years as a guest editor and contributor, and was the sole Editor from 2017 until I joined him in 2019. Josh's tireless energy, brilliant writing, and razor-sharp analytical skills is what allowed *Law Matters* to blossom into the publication it is now. From seeking out contributions from recognized scholars to comment on issues important to Albertans, to ensuring that the content of the magazine was always topical and meaningful, Josh shepherded *Law Matters* into this new digital age with enthusiasm, care, and skill. We are so grateful for his tremendous work and look forward to reading his future contributions as he continues to write on important issues facing the profession.

To everyone who has contributed to this magazine, thank you for your time, your words, and your ideas. You have elevated *Law Matters* into a recognized and trusted source of commentary in Alberta and beyond. And we look forward to continuing that commentary — indeed, expanding that commentary — on our new digital platform.

Contributing Authors

Elizabeth Aspinall
Fred Fenwick, Q.C.
Judge A.A. Fradsham
Frank Friesacher
Ricki-Lee Gerbrandt
Robert G. Harvie, Q.C.
Ummni Khan
Jennifer Koshan
Tuulia Law
Koren Lightning-Earle
Ola Malik
Naiomi Metallic
Judge Richard O'Gorman
Jessica Robertshaw
Dragana Sanchez-Glowicki
Joshua Sealy-Harrington
Justice Alice Woolley
Lee-Anne Wright

PRESIDENT'S **REPORT**

BY **OLA MALIK**

As I write this column in what is our last print publication of *Law Matters*, I find myself reflecting on what has been this most extraordinary summer. The murder of George Floyd and the upswell of protests in favor of Black Lives Matter (and the ensuing counter-protests), the debate in the U.S. over confederate imagery and the ravages that the pandemic has wrought around the globe has forced me to re-examine how we live together in community with others.

For me, community implies togetherness — a sharing of life's burdens and benefits, a sense that, whatever the challenges and stumbles, we're all in it together. That together, we share in life's joys and life's miseries — and that all of us, to the extent that we're able, do the heavy lifting. But if the idea of community implies a shared sense of identity, interest and values, then this summer has shown us, in brutalist perspective, how tenuous it is to speak of community at all.

Because so many have never shared in the benefits that community is supposed to confer. Because for so many, what community has come to mean is the realization that that they don't matter, they're not important, they're not worth it. That community just isn't for them.

And so that brings me to reflect on the work of the CBA. You might — if you were a newcomer to the CBA, or didn't quite know what we do — think that we were terrible at doing our job. You might think that the CBA, being the profession's largest advocacy organization, is in the business of making lawyers richer — better looking — nicer smelling — of making lawyers feel more important than they already do. But the CBA does none of these things — it's not who our members are — and it's not what our members want.

The great irony about the CBA is that its members want something that's quite outside of themselves — rather than our members helping themselves, it's about members helping others realize their aspirations by calling out inequity and redressing harm — respecting difference and encouraging diversity — and recognizing that everyone shares in that most human of all aspirations, that of living a fulfilled and meaningful life.

Protecting the public interest by advocating for a system of justice that allows for timely, efficient and effective access to legal services and for a way of resolving conflict that produces just outcomes — this is what the CBA does. And it's because of YOUR tireless work that the CBA has become the largest — and I dare say — the most important voice in this country, on legal advocacy and reform.

But the CBA isn't in it alone. Because a CBA member that serves as Chair of the Insurance Law Section might also serve on the board of Calgary Legal Guidance, volunteer with Pro Bono Law Alberta, or assist women in distress. Our members might also be involved in proposing new legislation through the Alberta Law Reform Institute, speaking up for changes in how we deal with family conflict, or proposing new Rules to enhance access to justice by self-represented litigants.

We are all in this together. I am truly so proud of the ways in which we've been able to work together, exploring new approaches to solving old problems, while also facing tomorrow's challenges. Together is how we'll get it all done — and if that doesn't work, or if we can't get along, then we'll just go to court and ask for costs.

As this is our final edition of *Law Matters* in its present form, I want to express my deep appreciation for all the work that our soon-to-be retiring editor, Joshua Sealy-Harrington, has put into making this magazine such a huge success. Joshua's vision for the magazine was to create a welcoming and brave space for a broad range of diverse voices that we really hadn't heard from and to tackle difficult issues that our community was talking about. Joshua, this magazine has been your labor of love. From all of us at the CBA, Thank You for all that you have done. We'll miss you. Equally deserving of recognition is Jessica Robertshaw, our extraordinarily talented co-editor, who has worked with Joshua over the last year on our print version of *Law Matters* and who will guide *Law Matters* into its new digital home. Jessica, you bring an amazing energy and engagement to the work that you do, and I can't wait to see what you accomplish over the next year.

In This Issue

2020-2021 CBA ALBERTA PRESIDENT

As our CBA year draws to a close, I want to extend a special thank you to our outgoing Past President Frank Friesacher. During his time on the executive committee, Frank has overseen significant changes in Alberta — from a renewed focus on advocacy that began with the 2019 provincial election, to the retirement of our branch council and introduction of a new governance structure, and now the uncertainty we are all facing as a result of a global pandemic. Each of our presidents stands in the shadow of their predecessor and I count myself so lucky for having learned so much from someone whom I greatly admire and respect.

I would also like to recognize our amazing outgoing board members Brynne Harding, Kyle Kawanami and Sheizana Murji. As three members of our inaugural Board of Directors, they were instrumental in helping us shape our governance culture and direction for the future. While their tenure on the board may have come to an end, they are each leaders and will be back, I'm sure!

We are excited to welcome Indra Maharaj of MT>Align (TransAlta) and Connect Thermal Energy Solutions Inc. as our incoming branch secretary. Indra brings a diversity of experience practicing in several provinces and a variety of practice areas and is an active member of CBA Alberta Sections. Indra will be joining the 2020-21 executive committee alongside President David Hiebert, Vice President Bianca Kratt, Treasurer Amanda Lindberg, myself as Past President, and Executive Director Maureen Armitage.

We also have three new directors joining our board in September — Aldo Argento of Norton Rose Fulbright (Canada) LLP, Sarah Coderre of Taylor Janis LLP and Jillian Gamez of Weir Bowen LLP. They will be joined by returning directors Jassmine Girgis, Patrick Heinsen, Robert Harvie, Q.C., Michelle Karasinski and Adam Norget. Join us in welcoming (and welcoming back) our 2020-21 executive committee and board of directors!

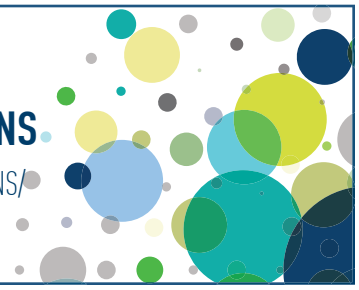
I am proud of the work that CBA Alberta has done through the course of the pandemic to advocate for the legal profession and the administration of justice. Our leadership continues to engage with stakeholders on matters such as remote delivery of services. This spring, the CBA Alberta provided input on the Alberta Protocol for Remote Questioning, which was developed in cooperation several other organizations in our province. This resource was referenced in a recent decision from the Court of Queen's Bench of Alberta (*Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 ABQB 359) as a useful tool for litigants and counsel when considering setting up remote examinations. We also released the CBA "Returning to the Office: Considerations for Law Firms" guide, which helps law firms plan for the transition back to in-office operations. These resources and more can be found on our COVID-19 resource hub at www.cba-alberta.org/COVID19.

One of the impacts of the pandemic this spring was the cancellation of our first annual Leadership Forum, which was meant to take place in May. Our board and executive committee have been working to revive the Leadership Forum for our members, and I am pleased to announce that it will now take the form of a series of webinars taking place throughout October and November. We will be launching the Forum with a panel discussion led by our own Equality, Diversity & Inclusion Committee on diversity, inclusion and how we can all be anti-racist in the legal profession. We are also excited to welcome Professor Julie McFarlane, Bruce Preston, Jordan Furlong, Minister of Justice & Solicitor General Doug Schweitzer, and the chiefs of the Court of Appeal, Court of Queen's Bench and Provincial Court of Alberta to speak to us about the challenges and changes we face as a profession due to the pandemic, and how we as a profession ensure we are addressing issues of diversity as we move forward. This series is free for all CBA members, and more information will be available to you in September.

The end of the summer brings membership renewal season at the CBA. If you have not already done so, don't forget to renew your national membership for 2020-21. We recognize that some members may be experiencing challenges due to the pandemic, and the CBA has made it easier than ever to maintain your membership. Members can set up monthly pre-authorized payments, and special assistance programs are available for members on parental leave, on a leave of absence, or who are unemployed. For more information and to renew your membership, visit www.cba.org/Membership/Membership-Information/Payment-Options.

CBA Alberta Section registration is also now open for Alberta members. To give our members more choice in how they access their Section programming, and to respond to the challenges brought by the pandemic, we have made some changes to how we are delivering Sections this year. First, we are combining the full and webcast Section memberships. Full Section members can now choose whether to attend meetings in person (when we are able to resume meetings at our offices), or online. Members located outside of Calgary or Edmonton can now register as full members of their preferred Sections and continue take in all the programming online. We are also offering all members a one-time discount of $40 per Section, which will be automatically applied when you register. Visit www.cba-alberta.org/Sections/Section-Enrollment for more information on these changes and to register.

This is my last opportunity to send you personal greetings. I am deeply humbled that you have given me the gift of serving as your President. It has been an experience I will never forget. I thank you from the bottom of the heart for your generosity of spirit, open-heartedness, and good humour. I wish each of you and your families the very best of health and fortune. And I can't wait to see you again soon.



INTRODUCING DAVID HIEBERT:**AND THE NEW CBA ALBERTA**

BY **FRANK FRIESACHER**

The 14th (and current) Dalai Lama said, "When you talk, you are only repeating what you know; but when you listen, you learn something new." Hearing this, I think of our incoming CBA Alberta Branch president, David Hiebert.

In 2017 Dave joined the executive. It's hard to remember before that, not at all because he overpowers, but because he takes the time to absorb comments from others, contemplate competing interests and perspectives, and then make thoughtful valuable input.

Dave is a CBA guy, through and through. He joined in 1994 as a law student and has been active throughout on various committees and section executives, including as Commercial Property & Leasing (North) co-chair, and as part of CBA Council provincially and nationally. In 2015 Dave became North Section Coordinator (my old job!), and then successfully ran as Branch Secretary.

This 2017 blurb from Dave on "why I am running" speaks well to his dedication:

> I am a passionate long-term member and supporter of the CBA. I want CBA Alberta to survive and thrive by changing its governance structure to better harness the passion, energy, and knowledge of its wealth of committed volunteers. I want to help CBA Alberta focus its resources on helping its Section executives deliver relevant presentations to Section members and making this wealth of materials and knowledge easily available to Section members. Finally, I want to ensure that CBA Alberta is fiscally prudent so that it can survive and continue to provide continuing legal education to its members.

Dave is not just a CBA guy; he is a CBA member guy. He focuses on how CBA can be relevant and responsive to members' needs and desires. His first question when we consider initiatives is, how can this benefit our members? He has great ideas for this: his brainchild, a lawyer advocacy committee, being one example. His most (literally) palatable idea is for pierogies for all section lunch meetings. I am curious how this will be fulfilled via videoconferencing, but no doubt Dave will focus energies on any endeavour so beneficial to members' hearts... and stomachs!

Dave is a solicitor. As a litigator, I have heard over the years the old stereotypes: barristers are extroverts who excel at public speaking; solicitors are introverts, bookish, shy and colourless. Stereotypes are dangerous: while they may hold some element of truth, they are usually wrong enough to completely mislead. Dave is a good example.

Dave has exceled in his 25-year legal career in assisting commercial developers, in contractual drafting and interpretation, and resolving commercial and construction disputes: in brief, helping people and businesses find safe passage through difficult legal waters. Before law he completed his B.Sc. (computing science specialization) and his MBA. He is partner at Witten LLP: well-liked in his firm and a well-respected member of the legal community.

At first blush, Dave has a quiet manner. But as per Susan Cain's book Quiet: The Power of Introverts in a World That Can't Stop Talking, don't mistake introversion for shyness or inhibition. I know him to be a witty, high-octane public speaker. At the mentor reception last fall, Dave presented (to great effect) on why law students should treat their lawyers like pet rocks! Bringing CBA greetings at swearing-in ceremonies for newly appointed judges, Dave strikes that ineffable balance between solemn deference and daring cheeky humour. His computer skills shine in his PowerPoint presentations containing rare photos of these judges. And who else could get away with tossing a frisbee in open court, before hundreds of onlookers and dozens of the judiciary? Dave's unique perspective and distinctive manner of speaking makes one endear to him and pay attention. As for being colourless... one has only to observe Dave's love for sporty cars, spiffy bowties and great socks to dispel this notion outright.

Dave is husband to charming wife Nicole 27 years, with whom he enjoys travel (remember travel?) and all kinds of goings-on, various cooking classes forming the more recent activities. Most recently he has been enjoying piano lessons.

CBA Alberta structure transformed in 2019 with adoption of new bylaws and creation of a 13-member governing board, including the executive Dave will head in 2020-21 along with Vice President Bianca Kratt, Treasurer Amanda Lindberg, recently elected Secretary Indra Maharaj and Past President Ola Malik. I was excited to see the board's first iteration make great strides and am confident the incoming board will continue focusing energies on five CBA pillars: developing deep, smart member intelligence; delivering distinct & relevant professional development; advocating on behalf of the profession; preparing us for the future; and cultivating an inclusive, engaged professional community. In this heady undertaking, we are buoyed by the calm guidance of our own Executive Director Maureen Armitage, and by our unparalleled CBA staff in both Edmonton and Calgary who make the member experience amazing.

Those who know him best speak of Dave in glowing terms. He is unpresuming and humble, always willing to provide a witty comment and a helping hand. He is first to assist at a CBA function and last to leave once he has chatted with everyone. His appreciation for things technical and novel will push the CBA forward in innovative ways. He ensures voices are heard, regardless of vintage at the profession. He handles himself with grace and diplomacy, approaching others with civility and respect. These qualities, combined with invaluable experience gained on the executive the past three years, will make Dave an excellent voice for our members.

Attributed both to Socrates and Buddha, but likely a universal piece of wisdom, is this: Before speaking, be mindful of these three things: Is It True? Is It Necessary? Is It Kind? Our incoming president exemplifies this. In a world increasingly full of fake, Dave is authentic. Especially given the challenges we face as an organization and as a profession, those which we have seen coming on the horizon and those which burst out of the sea, we will be most fortunate to have David Hiebert at the rudder.

UNSUNG HERO: **LUNGILE (LULU) TINARWO**

BY **ELIZABETH ASPINALL**

This feature titled "Unsung Hero" introduces a member of our profession who has demonstrated extraordinary leadership, innovation, commitment, or made significant contributions to social justice and community affairs.

We are delighted to introduce you to Lungile Tinarwo, or "Lulu", as she goes by.

This has been an instructive year for our profession. We have learned to juggle Zoom meetings with cats on keyboards, or with the background of noisy kids who really should be in school. Oh wait, schooling the kids has been our job, too.

LULU **TINARWO**

More importantly, we have confronted fundamental questions, too long deferred, about systemic racism and discrimination, in our society and profession. These questions force us to reflect on our own roles, beliefs and actions. It is difficult to think about whether our own opportunities and privileges have come at a cost to people of color, and people who belong to vulnerable communities. It is also difficult to think that rights that many of us take for granted, such as rights to self-fulfillment and individual actualization, are not available to others. Addressing these difficult questions requires perspective and a willingness to be open-minded.

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.

This is a perspective that Lulu can tell you about first-hand. Originally from Zimbabwe, she came to this country as a young university student, attending first Mount Allison University in New Brunswick to complete her BA, and then the University of Victoria to complete her LLB. In both programs Lulu excelled and received awards and certificates. While these achievements are remarkable enough, her dedication and work are further underscored by the fact that Lulu came to Canada alone. Unlike many university students, she did not have the benefit of a family supporting her university journey. Her parents, who have now passed, remained in Zimbabwe. Lulu came to Canada with a thirst for opportunity and a drive to take advantage of it.

In addition to her achievements at university, Lulu has considerable community engagement. She has held extracurricular positions within the profession as well as within the larger community. Her contributions, too many to list, include founding the Alberta Association of Black Lawyers, and working with impoverished families in Ontario.

If you ask her, Lulu can tell you what it is like to be a young black woman, a lawyer, an immigrant, and a mother raising a six year-old girl. Lulu can tell you how it feels to be the only black lawyer in the courthouse, and one of the few in this profession. She can tell you that while her law school friends had no difficulty getting financing to start their own law firms, banks were more reticent about taking the same risk with her.

Lulu can describe how it feels to be told in court to speak more loudly or to enunciate more clearly, though her English is perfect. She can tell you painful details of professional experiences - court appearances and client interactions – where she was treated differently from her colleagues only because she is a black woman.

Bigotry is like a cold draft. You might not see it, but you can feel it. For Lulu, each new file or client presents obstacles that most of us need not navigate – having to prove to her client and the court that she is just as competent as other lawyers, having to make sure she does not speak with too pronounced of an accent, having to satisfy her client that she can do just as good of a job for them as any white male lawyer.

These challenges have not dissuaded Lulu. She is a proud and effective advocate, a family lawyer who owns her firm, Tinarwo & Associates. Lulu mentors junior lawyers and students and has established a policy of being a principal to black students, ensuring their skin colour is not factored into determining their promise as a student or young lawyer.

It is not just students and young lawyers whom Lulu supports. Many of Lulu's clients are also black. They benefit from her experience and perspective on the challenges they face in the justice system. Her firm offers a safe space for clients, and for lawyers who might otherwise add discrimination and harassment to the demands of practice.

Lulu is passionate about equity and diversity. She is committed to change, however slow, and she is prepared to stand at its centre, encouraging us to think outside of our own privilege to conceive of a reality that she and others face daily. She wants to serve as a role model for her peers, to stand in front of them and say "If I can do it, so can you. You can become part of this change".

Our profession is privileged to include Lulu among us. As one of the incoming co-Chairs of the CBA's Equality, Diversity & Inclusion Committee, Lulu will be at the centre of a dialogue that will challenge us to think about how our profession can address questions of systemic discrimination and racism, and how we can become a more inclusive community.

Lulu, you are an "unsung hero" -- and you represent some of the finest qualities of our profession.

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

A CHAMPION AND **VOICE OF THE PROFESSION**

BY **JUDGE RICHARD O'GORMAN**

Judge Richard O'Gorman was Editor of Law Matters and Chair of the CBA Alberta Editorial Committee from 2002 to 2004.

As we all do our best to navigate these unprecedented times, I think it is helpful to embrace those core values that identify the society we wish to live in. Real and true leadership is so important in maintaining confidence and respect for our communities, our organizations and, especially, our legal system. I have always looked up to the Canadian Bar Association (CBA) as a champion and a voice of the profession, an effective advocate of the rule of law and just about everything that makes Canada a great leader in the free world.

I use the phrase "free world" deliberately because I am concerned that the recent toxic erosion of so many legal and ethical principles in so many places has, unfortunately, permeated our new world. Chief Justice Roberts of the United States Supreme Court recently confirmed that the threats to the rule of law and democracy are real, multiple and urgent (2019 Year-End Report on the Federal Judiciary).

An independent bar and judiciary creating unity and stability have always been the foundations of the CBA. The rule of law supports our democracy, it creates a social contract and is the arbiter of disputes, as well as the insurer of basic human rights (Mark A. Cohen, February 20, 2017). As lawyers and judges, we serve the public and it is in the public good that we should advance the rule of law. Without the necessary checks and balances, we could lose the values and fortitude that holds everyone accountable under the law. Therefore, it is important that the profession, as a whole, takes the lead in defending the rule of law. Through civil education and good advocacy, we can hopefully restore the public faith and confidence. I am certain that an inclusive CBA will always stand for these principles.

THE HON. JUDGE RICHARD O'GORMAN is judge of the Provincial Court of Alberta in the Calgary Family and Youth court. Prior to being appointed to the bench, Judge O'Gorman was editor of *Law Matters* from 2002 to 2004 and was president of the CBA Alberta in 2005-06.

YOU'VE COME **A LONG WAY BABY!**

BY **DRAGANA SANCHEZ-GLOWICKI**

Dragana Sanchez-Glowicki was Editor of Law Matters and Chair of the CBA Alberta Editorial Committee from 2007 to 2013.

My first memory of the Canadian Bar Association ("CBA") and the Alberta Publication of *Law Matters* was in 1994. I was an articling student with the Calgary law firm of Walsh Wilkins (as it then was). The firm paid for my CBA and Alberta Young Lawyers Section Memberships. I was new to the profession, excited, eager, and thrilled to be integrating myself into one of the oldest and noblest of professions. I didn't think it got any better then a free membership to what I considered, and still consider to be, the most prestigious legal association in Canada. The speaker at my very first meeting of the Young Lawyers section was none other than the late Honourable Madame Justice Cecelia I. Johnstone. I'll never forget the experience. 12 to 15 young lawyers attended the meeting on that warm day in mid-October. We were fortunate enough to enjoy lunch, sitting around a table with a senior female Q.C. lawyer, in a beautiful CBA meeting room, with the Rocky Mountains in the distance. I felt like I had died and gone to heaven. The structure of the meeting was an informal discussion with her Ladyship, about her experiences in the legal profession, from her first year of practice, all the way up the ladder to becoming a partner in a prestigious law firm. Had I known only 2 years later she would be appointed as a Queen's Bench Justice, I likely would have been too nervous to eat my lunch. Justice Johnstone was poised, polished, friendly and real. When the meeting concluded, she gave each of us a grab bag! In the bag, amongst many treasured goodies from her firm, was a copy of both the March & June 1994 publications of *Law Matters*. I read both magazine at least 5 times from cover to cover. The educational component was invaluable to me. But, gazing at the black & white pictures and carefully reading all the names beneath the pictures, while imagining myself one day involved with the organization was exciting & dreamy. It was on that October day I learned the value of the CBA and *Law Matters*. Little did I know my dream would come true and shape my career and my practice for the next several decades. The CBA, and my involvement in the organization and particularly *Law Matters*, changed the trajectory of my career. I owe the CBA and *Law Matters* so much.

Hon. John (Jack) Major, C.C., Q.C.
Mediator & Litigation Consultant

Jack Major served as a member of the Supreme Court of Canada from 1992 to 2005, and as a member of the Courts of Appeal of Alberta and the Northwest Territories from 1991 to 1992. Prior to his judicial service, he was a leading commercial litigation practitioner with Bennett Jones LLP, where following his judicial service, he continued as counsel until March 2020.

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Through the decades, my involvement with the CBA was continuous, varied, meaningful and super fun. Unequivocally the highlight was sitting on the editorial committee of *Law Matters* for over 10 years, and, being the editor for 7 years. The first time I was asked to be a "Guest Editor" was in June of 2005. Unbeknownst to me at that time, I had been passed a torch. It was some two years later, in the fall of 2007, I was officially told that the title "Guest Editor" had been changed to "The Editor". Replacing the words "Guest Editor" with "The Editor" gave me constant stomach butterflies. I took my new roll very seriously, and considered my second first publication as "My Baby". I must have put in over 200 hours labouring over every word and making sure the publication was perfect. All I could think about was if I screw anything up, people have the option of "re-read, forever"! It was scary to say the least. I was rewarded very quickly when I received a note from Eugene Meehan, Q.C. saying "Dragana, Really good issue, Regards, Eugene". Those few words, from a senior and accomplished lawyer from Ottawa (who's second home is the Supreme Court of Canada) confirmed I had not bitten off more then I could chew, and that the 200+ hours of sweating was worth it. Thank you Eugene, I still have your note in my Archives. Over the years the committee and I developed, changed and grew the publication. The publication took on a new look, a quarterly theme, a consistent table of contents, photographs of the editorial committee, several new columns such as "Back to Basics", the "Unsung Hero", "Health Matters", just to name a few. As *Law Matters* evolved and changed, we all evolved, changed and learned so much from our service to the publication. Education was a huge component of the publication, and the committee continuously scoured the profession to ensure experts in the various areas of the law wrote the educational pieces. The contributors explained the law succinctly and eloquently, helping lawyers across the province be on the cutting-edge. The education components were always timely, relevant and helped me with my Estate Litigation Practice. "Practice Pointers" was always an invaluable read. Judge A. A. Fradsham's "View from the Bench" was always an enjoyable read. "What's Happening" kept the profession in the loop. The publication had something for everyone.

For me, the cherries on the cake were the people I was fortunate enough to get to work with, both on the Editorial Committee, and at the CBA offices. The committee members I am so grateful to, as they then were, and in no particular order; Justice E. I.

MUSINGS FROM **A PAST EDITOR**

BY **ROBERT G. HARVIE, Q.C.**

Robert Harvie, Q.C. was Editor of Law Matters and Chair of the CBA Alberta Editorial Committee from 20013 to 20017.

I have been asked to give a few words regarding my past experience working as a contributor, a committee member and for some time as Editor of *Law Matters* Magazine. I have been quite blessed, really, firstly to be a lawyer. After 34 years of practice, I still have great pride and appreciation for being a member of what I consider to be the finest of all professions and to be the cornerstone of a functioning free and democratic society. We often lose track of this as a profession in my experience as we tend to see law as a business and as a commodity. However, it is worth reminding ourselves that, often, a lawyer is the only thing standing between freedom and tyranny. What we do matters, greatly.

So, to begin with, there is that.

However – I have been further blessed – to have been able to have given back to my profession through work with several groups and organizations which have all focused on making that profession better in some fashion. One of my most rewarding experiences, clearly was the work that I was able to do with *Law Matters* – as a contributor, as a Board Member, and for some time as the Editor of this publication.

While the topics varied greatly, at their core, each and every issue of *Law Matters* exemplified some of the best of our profession taking time to share their knowledge, their perspectives and their advice on making the practice of law and the justice system as good as it could be – and in the bargain, making our Province and our Country a better place as well.

My experience was that difficult questions were frequently tackled by *Law Matters* without resort to political boosterism (though we all obviously have political perspectives), without resort to polarization in the effort to attract attention or readers, and with an eye to understanding and examining the complexities of justice and the practice of law.

In an age where so much of our media, and most certainly social media, seek to drive wedges between our citizens – and in doing so, often leading our politicians in the same direction – *Law Matters* has always taken a higher road. It has always, without exception, sought to educate and inform. As such, *Law Matters* and publications like it are fundamental to providing a nuanced and considered perspective on difficult issues central to question of whether our justice and political systems truly serve all persons.

These are difficult but critically important issues – and when social media, mainstream media and our own politicians tend to drive people apart with views often devoid of nuance or, in fact, substance – I have been so proud to have been a part of what I consider to be a group of incredibility dedicated staff and volunteers that took the better path.

Thank-you so much for having given me the opportunity to have been a part of such an incredibly important group and thank you to all the staff and volunteers who have made *Law Matters* work and who have made the experience so enjoyable.

ROBERT G. HARVIE, Q.C. is a partner at Harvie denBok Pollock in Lethbridge, where he practices divorce and family law. Rob is a current member of the CBA Alberta Board of Directors, and a past Bencher of the Law Society of Alberta. He was editor of *Law Matters* from 2013 to 2017.

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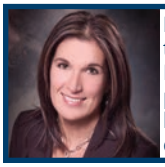
Picard, Terrance Cooper,Q.C, Jason Schlotter, Scott Watson, Q.C. Devin Mylrea, Robert Harvie, Q.C., Tony Young, Q.C., Justice Gillian Marriott, Justice Michelle Hollins, and the late Shannon McGinty. These brilliant people took their volunteer position as seriously as their paid jobs. The dedication, devotion and energy the committee members, the CBA staff we worked with, Terry Evenson, Lindell Larson and Heather Walsh, and all the contributing writers brought to the publication, was over the top. Each time I looked at a final proof, I remember thinking, "this edition is the best one yet, I don't know if it's possible to make it any better next time". But, each time it was even better.

Every publication was memorable, but I fondly remember a few special publications. Of course my first publication as Guest Editor in June of 2005, and equally as important was my second first publication as The Editor in the fall of 2007, when I realized this was "my baby". The January 2007 publication when I interviewed our then Premiere, Ralph Klein. Then there is the fall 2008 publication when my twins came a bit early and Tony Young received a very late Friday night SOS call from the maternity ward asking for his help in order to meet the Monday morning deadline. And, of course, the last publication in the summer of 2012, as I walked down memory lane and reflected on all the good our committee was responsible for, and officially passed the torch onto Shannon McGinty.

I never thought I would walk down memory lane a second time, until Jessica Robertshaw, the current co-editor of *Law Matters* contacted me and asked me to write a piece for this, the last and final print edition of *Law Matters*. This baby is now moving to an entirely digital publication format. Of course I said yes to walking down memory lane a second time. And, although this baby is no longer mine, I am proud to have helped it grow, evolve, and watch it graduate to become the first CBA provincial publication to go entirely digital in September 2020! Congratulations to each and every Editorial Committee member and Editor from the 1st publication and into the future. We all had an influential role and we should all be very proud.



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A FEATHER NOT A GAVEL: REVIEWED BY FRED FENWICK

BY **FRED FENWICK, Q.C.**

This article was originally published in the August 2001 edition of Law Matters.

"How many times can a man turn his head, pretending he just doesn't see?
The answer, my friend, is blowin' in the wind ..."

Pete Seeger hated that song. He was an in your face, "you won't get me I'm part of the union" kind of folk singer. Answers didn't blow in the wind 'cause Pete would tell you to your face. But Dylan knew. Anyone, even a person of goodwill can, for no apparent reason, be blind to what is going on around him.

Canada's national blindness is the plight of our Aboriginal citizens and in between 1988 and 1991 Al Hamilton, the Associate Chief Justice of the Family Division of the Manitoba Court of Queen's Bench got his eyes opened in a big way. Reacting to the death of Aboriginal leader J.J. Harper at the hands of an Aboriginal Police Officer in March of 1988 and the 1988 trial of four accused in the abduction and murder of nineteen year old Helen Betty Osborne (which had been covered up by an eleven year conspiracy of silence) the Manitoba Government called for an Aboriginal Justice Inquiry co-chaired by Justice Hamilton and Provincial Judge Murray Sinclair.

"A Feather Not a Gavel...." by Justice Hamilton is published on the 10th anniversary of the release of the report of the Inquiry and contains many of the Inquiry's findings and still unimplemented suggestions.

Justice Hamilton, as an experienced jurist, recognizes whatever we say about "justice" and the philosophy behind it, justice remains, in its administration, a commodity dispensed day after day, in industrial quantities. In a methodical way and with the perspective of years of practical experience Justice Hamilton steps through the Aboriginal experience with our justice system from lack of education and unemployment through Child Welfare matters to arrest, bail, criminal trials and sentencing showing how the system stacks the deck against Aboriginal citizens at most stages of the process.

For example, the legislative requirement in Child Welfare cases forces a court to focus on the child need for protection but denies the court the jurisdiction to inquire about the best interests of the child in the longer term. If a child is temporarily in need of protection then the subsequent interest in the reunification with extended families is at the mercy of Child Welfare bureaucracy. Could this be a reason behind the number of Aboriginal children in foster homes and the subsequent turmoil in their lives?

Aboriginal persons charged with crimes are regularly airlifted out of their remote communities to distant circuit points making bail or even contact with their families impossible and making extensive pre-trial custody for even minor matters a virtual certainly.

Occasionally unpleasant to read, this book is still important not only for what it says about the reality of how our justice system serves Aboriginal citizens but also for the more basic necessity to ask both what we expect of our justice system and to periodically audit whether our expectations are being delivered. Justice Hamilton thinks we can do better and sets out a range of suggestions from bail and circuit point reform through to a description of the actual experience of Aboriginal and restorative justice systems in Australia, New Zealand, U.S.A. and (of all places) Scotland.

Even the sub-title of this book ("Working Towards Aboriginal Justice) shows Justice Hamilton recognizes the Canadian justice system as a work in progress. With any luck, a law school or university jurisprudence course will pick this book up as a realistic and practical counter-point to Thomas Hobbs.

"A Feather Not a Gavel" is published by Great Plains Publishers of Winnipeg, Manitoba, and is available from online book retailers.

Photo: "Feater in hand" by Ibrahim Rifath (https://unsplash.com/@photoripey)

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TRINITY WESTERN UNIVERSITY LAW SCHOOL: **EQUALITY RIGHTS, FREEDOM OF RELIGION AND THE TRAINING OF CANADIAN LAWYERS**

BY **JUSTICE ALICE WOOLLEY** AND **JENNIFER KOSHAN**

This article was originally published in the Summer 2015 edition of Law Matters.

Introduction

Should lawyers be trained at law schools that effectively exclude LGBTQ students? Prior to 2013, our secular and public system of legal education meant this issue never arose. But in December 2013, Trinity Western University (TWU), whose mission is "As an arm of the Church, to develop godly Christian leaders", received approval from British Columbia's Advanced Education Minister to open a law school. TWU's Community Covenant Agreement requires students (and other members of the TWU community) to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

TWU's insistence that its future law students and law professors abide by this Covenant has sharply divided the legal profession and academy with respect to the appropriate place for TWU law school and its graduates in the legal landscape. In this article we outline the developments in relation to TWU law school, including responses by law societies, governments, the courts, and law schools. We also set out some of the legal and policy issues raised by TWU law school. We do not here take a position on TWU's application; our purpose is simply to foreground the other articles in this newsletter.

Responses by Law Societies, Governments and the Courts

In the first instance, the Federation of Law Societies – the non-binding but influential national working group of the provincial and territorial law societies – struck an Approval Committee to consider TWU's proposed law degree. While such a Committee would normally be composed of 4 members of the profession and 3 law deans, the 3 law deans stepped down after the Canadian Council of Law Deans took a formal position opposing TWU's application. Another Committee member stepped down during the process, with the result that the final decision was made by just 4 of 7 Committee members, and only 3 members of the original Committee. The Committee considered TWU's proposal and also opposing submissions that emphasized that TWU's Covenant "effectively bans LGBT students" and may prevent it from properly teaching legal ethics and professionalism or constitutional law. The Approval Committee acknowledged tension between the Covenant and TWU's ability to satisfactorily instruct students in Constitutional Law and Legal Ethics and Professionalism. It concluded, however, that this tension created only a "concern," not a "deficiency," given TWU's statement that its courses would "fully and appropriately" address" ethics and professionalism," and that "the courses that will be offered at the TWU School of Law will ensure that students understand the full scope of [human rights and constitutional] protections in the public and private spheres of Canadian life." As a consequence, the Committee granted preliminary approval to TWU.

The Federation's decision was adopted by the law societies in several Canadian provinces and territories, including Alberta, Saskatchewan, Prince Edward Island, Newfoundland and Labrador, and Nunavut, although not necessarily with enthusiasm. For example, the Law Society of Alberta explained that while it had delegated its decision to the Federation, it had advised the Federation that "a review of the existing criteria [for law school approval] by the Federation is advisable… consistent with the recommendation… that the possibility of a non-discrimination provision should be discussed."

Turning to the decisions of individual law societies, in April 2014, the benchers of the Law Society of British Columbia (LSBC) voted 20-6 against a motion barring TWU graduates from admission to the profession. However, three months later, its membership passed a non-binding resolution that the LSBC reverse its decision. In September 2014, the LSBC initiated a referendum, asking its members to vote on the resolution that "the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admission program." The resolution passed by a 74% majority, and this outcome was subsequently ratified by the LSBC's benchers in October 2014, effectively withdrawing the LSBC's prior support for TWU law school. TWU has now launched an application for judicial review against the LSBC (for a decision on a preliminary matter in the case see *Trinity Western University v. Law Society of British Columbia*, 2015 BCSC 416).

At the same time that the LSBC made its initial decision in favour of admitting TWU law students in April 2014, an action was initiated in British Columbia Supreme Court by prospective law student Trevor Loke to quash the BC Advanced Education Minister's approval of TWU's law school on constitutional grounds. In December 2014, following the LSBC's referendum results and ratification, Minister Amrik Virk revoked approval for the law school. According to the Minister, "The current uncertainty over the status of the regulatory body approval means prospective graduates may not be able to be called to the bar, or practise law, in British Columbia… There is currently nothing in the terms and conditions of consent to prevent TWU from enrolling students in the proposed law program before the law society challenges are resolved. I do not believe this would be in the interests of students given the current level of legal uncertainty." The Minister also indicated that TWU had the option to renew its request for approval of its proposed law school once its legal issues were resolved. Following his revocation for the law school, he successfully argued that Loke's action should be declared moot (see *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413).

In Ontario, Law Society of Upper Canada (LSUC) benchers voted 28-21, with one abstention, to reject TWU's application for accreditation. TWU has challenged this decision in Ontario Divisional Court, with hearings set for June 2015. A number of parties have been granted intervener status in this action

including the Christian Legal Fellowship, the Evangelical Fellowship of Canada and the Christian Higher Education Canada, the Judicial Centre for Constitutional Freedoms, Out on Bay Street and OUTlaws, the Advocates' Society, and the Criminal Lawyers Association (see *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541).

Many of these groups also intervened in TWU's judicial review application in Nova Scotia, which challenged the April 2014 decision of the Nova Scotia Barrister's Society (NSBS) to make accreditation conditional on TWU withdrawing its Covenant or granting an exemption to law students. In January 2015, in the first legal decision on the merits concerning TWU law school, Justice Jamie S. Campbell ruled in favour of TWU (see *Trinity Western University v. Nova Scotia Barristers' Society,* 2015 NSSC 25). He held that the NSBS did not have jurisdiction under the *Legal Profession Act,* SNS 2004, c 28, to make a decision that required TWU to change its policies. He noted in particular that there was no evidence that TWU law graduates would lack the training to serve their clients or be more likely to discriminate against them. In the alternative, if the NSBS did have the authority to make the decision it did, Justice Campbell ruled that the decision violated the *Charter* protected freedom of religion of prospective TWU law students, which included the right to obtain an education in accordance with one's faith. He further held that the decision could not be justified as a reasonable limit on freedom of religion. According to Justice Campbell (at para 13), "It is hardly a pressing objective for a representative of the state to use the power of the state to compel a legally functioning private institution in another province to change a legal policy in effect there because it reflects a legally held moral stance that offends the NSBS, its members or the public." Justice Campbell also awarded costs of $70,000 against the NSBS (see *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100).

The NSBS has filed an appeal of Justice Campbell's decision, indicating that "If left unchallenged, this ruling may significantly restrict the scope of the Society's authority to uphold and protect the public interest in regulating the legal profession. It may also prohibit the Society from continuing to take on a wider role in the promotion of equality in all aspects of its work, including in the administration of justice."

In New Brunswick, members of the Law Society Council originally voted in June 2014 to accredit TWU law school by a vote of 14 to 5. The Council then held a Special General Meeting in September 2014, where members of the Law Society of New Brunswick (LSNB) voted 137 to 30 directing Council not to approve TWU law school as a recognized faculty of law. The resolution was not binding on Council, however, which – as a result of a tie vote in January 2015 – upheld its original decision to accredit TWU law school. The LSNB is therefore the only law society that has considered the matter independently of the Federation of Law Societies and has decided to approve TWU law graduates.

Our discussion so far has focused on provincial regulators and governments, but the federal government has also played a role in the legal proceedings concerning TWU law school. The federal Attorney General intervened in the Nova Scotia litigation, and will also intervene in the Ontario litigation. Its position has been that refusing to admit TWU law graduates to a law society is unreasonable: "The public interest does not require banning all students from Trinity Western University from becoming members of the Law Society… (the end result of the failure to accredit Trinity's Law School). This is a disproportionate approach as the [Law Society] can deal with discriminatory conduct of a member on an individual basis." The federal government's interventions have been called "perplexing" by counsel for OUTlaws, given that the provinces regulate the legal profession.

We are therefore left with three law societies that have effectively decided not to admit TWU law graduates to the profession, with challenges to those decisions by TWU underway in all three jurisdictions. The remainder of law societies across Canada have voted in favour of accepting TWU graduates either directly through their own decision making bodies, or indirectly by accepting the decision of the Federation of Law Societies.

In addition, the legal blogosphere has allowed individual lawyers to express their views on TWU law school. For a range of opinions see Omar Ha-Redeye, "A Law School for Homophobes" (Slaw, July 28, 2013); Janet Epp Buckingham, "What's all the fuss about Trinity Western University" (The Cardus Daily, February 10 2014); Julie Sobawale, "The TWU Debate Continues" (Slaw, February 26 2014); Susan Van Dyke, "What Will a Trinity Western University Law Degree Be Worth" (Slaw, April 24, 2014); Mitch Kowalski, "With TWU Decisions – Whither the Federation of Law Societies" (Slaw, April 27 2014); Jamie Maclaren, "TWU Law and the New Reality" (Slaw, October 8, 2014); Lee Akazaki, "B.C. Minister's reason for revoking TWU's JD hurts the legal academy" (Gilbertson Davis LLP Blog, December 31 2014); Albertos Polizogopouls "A Good Day for Religious Freedom in Canada" (Faith Today, January 29, 2015).

The Response by Law Schools and Legal Academics

Law schools and legal academics have also weighed in on TWU law school. A number of law schools passed faculty council resolutions or wrote letters expressing concerns to their law societies about accepting TWU law graduates: see for example the joint letter from the University of Alberta and University of Calgary Faculties of Law to the Law Society of Alberta (Jennifer Koshan, Jonnette Watson Hamilton and Alice Woolley, " U of C and U of A Law Profs' Submission to the Law Society of Alberta on Trinity Western University Law School" (ABLawg, January 29, 2014), and faculty council resolutions from the University of Victoria (see Gillian Calder, "UVic Law and the Debate Over Accreditation of a New Law School at Trinity Western University, The Advocate, September 2014); University of British Columbia; University of Windsor, Osgoode Hall Law School; Queen's University; and Dalhousie University. Student organizations have also been active in advocating to law societies on TWU, largely through the OUTlaws branches at law schools across the country, but also through other student organizations.

Amongst legal academics, TWU's proposal for a law school has been criticized by Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25 Canadian Journal of Women and the Law and "TWU Law: A Reply to Proponents of Approval" (2014) Dalhousie Law Journal (forthcoming). Angela Cameron, Angela Chaisson and Jena McGill defend the decisions of law societies not to accredit TWU in "The Law Society of Upper Canada Must Not Accredit Trinity Western University's Law School", (2014) University of Ottawa Working Paper Series. On the other hand, TWU's law school has been defended by

Faisal Bhabha, "Let TWU Have Its Law School" (Slaw, January 24, 2014) and Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Const. Forum 1-14. The implications of rejecting TWU's application have been questioned by Carissima Mathen and Michael Plaxton, "Legal Education: Religious and Secular: TWU and Beyond" (2014) University of Ottawa Working Paper Series. Saul Templeton has critiqued the discourse around the private status of TWU in "Trinity Western University: Your Tax Dollars at Work" (ABlawg, March 9, 2015); and Paul Daly has questioned the administrative law basis for Justice Campbell's decision in Nova Scotia ("Reviewing Regulations: Trinity Western University v. Nova Scotia Barristers' Society 2015 NSSC 25" (Administrative Law Matters, February 5, 2015)). Some legal academics and law students also made submissions to the law societies in their jurisdictions (see e.g. Dianne Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" reprinted, (2014) 23(1) Constitutional Forum).

Legal and Policy Issues

That TWU's proposed law school has led to conflict and division amongst Canadian regulators, governments, lawyers, and the legal academy is unsurprising given the troubling legal and policy issues it raises. Over the past decade the legal system has clearly recognized the equality rights of LGBTQ Canadians. But the Canadian constitution also protects freedom of religion, and some human rights codes – including that in BC – protect the ability of religious organizations to grant preferences to members of their own groups (see *Human Rights Code*, RSBC 1996, c 210, s 41).

The balance between these interests has been considered previously in the context of professional regulation, but that consideration does not eliminate uncertainty about the appropriate legal and policy response to TWU law school. In 2001, the Supreme Court of Canada reviewed a decision by the British Columbia College of Teachers not to accredit TWU's teaching college in part because of its Community Covenant. The Court overturned the College's decision for a number of reasons, but in part because it was of the view that "the admissions policy of TWU alone is not itself sufficient to establish discrimination" under the *Charter* given that it is "the voluntary adoption of a code of conduct based on a person's own religious beliefs" (*Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, para 25 (*TWU v BCCT*)). But the Court's reasoning in that case may not determine the outcome for TWU. The legal rights of LBGTQ people have evolved significantly since 2001. Legal education arguably raises different issues.

The decision does, however, observe the basic tension between freedom of religion and equality rights that TWU's Community Covenant raises. On the one hand TWU's supporters can claim the significance of their religious convictions and the traditional religious position requiring sexuality to be confined to heterosexual marriage. On the other hand, its opponents can note that there is no normative reason to view discrimination against LGBTQ people on religious grounds as any more acceptable than discrimination against people of colour or women. That religions have always discriminated against LGBTQ people creates a longer history of which to be ashamed; it does not create a justification for continuing acceptance of their doing so.

In addition, the TWU case raises regulatory conflicts. The approval (or rejection) of a law school that effectively excludes LGBTQ persons can occur through the Ministry of Advanced Education, through provincial human rights legislation or through each of the provincial legal regulators who determine which lawyers may practice in its jurisdiction. Which of these bodies is best suited to exercise this jurisdiction? It can be argued that human rights tribunals are more suitable than legal regulators to assess discriminatory conduct by TWU. But at the same time, if legal regulators have the jurisdiction to accredit law schools, and if they have a reasonable basis for concluding that a law school's conduct is discriminatory, than ought they to decline to exercise their jurisdiction simply because one province's human rights legislation exempts religious organizations from anti-discrimination obligations?

Another complexity arises from the fact that the Canadian legal regulators have agreed to work cooperatively through the Federation of Law Societies. Some legal regulators, such as the Law Society of Alberta, have put that cooperation ahead of conducting their own debate over how TWU's law school should be treated. Other law societies in Ontario and Nova Scotia have refused to do so. The absence of consensus on the Federation's actual authority and legitimacy has been revealed by the TWU issue but may also have contributed to the divided response to the Federation's initial report. Yet the implications of that divided response are uncertain given law societies' work towards national coordination. If TWU graduates can be admitted in Alberta, then what is to stop those graduates from being called there and then moving to Ontario, invoking the mobility agreement to which all the law societies are signatories? And if they are not permitted to move to Ontario, then what is the effect of that decision on inter-provincial mobility, and how does that cohere with constitutional protection of mobility rights?

There are many complexities raised by TWU law school, and we commend the Canadian Bar Association and the editors of this newsletter for gathering a broad range of views on how those complexities ought to be resolved.

An earlier version of this article appeared in (2014) 17(3) Legal Ethics 437-441.

Postscript: On July 2, 2015, after this article when to press, the Ontario Divisional Court upheld the decision of the Law Society of Upper Canada to refuse to accredit Trinity Western law school. See Trinity Western University v The Law Society of Upper Canada, 2015 ONSC 4250.

Photo: "Bible on top of rainbow flag " (iStock.com/DNY59)

THE HON. MADAM JUSTICE ALICE WOOLLEY is a justice of the Court of Queen's Bench of Alberta. Prior to her appointment in 2018, she was a professor of law and Associate Dean (Academic) at the Faculty of Law, University of Calgary, and was the City of Calgary's first ethics advisor.

JENNIFER KOSHAN is a Professor at the University of Calgary Faculty of Law. Her teaching and research interests are in the areas of constitutional law, human rights, and state responses to violence. She was a 2020 recipient of the CBA Alberta & Law Society of Alberta Distinguished Service Award.

HOT FOR KINK, BOTHERED BY THE LAW: **BDSM AND THE RIGHT TO AUTONOMY**

BY **UMMNI KHAN**

This article was originally published in the Summer 2016 edition of Law Matters.

"The things that seem beautiful, inspiring, and life-affirming to me seem ugly, hateful and ludicrous to most other people. This may be the most painful part of being a sadomasochist: this experience of radical difference, separation at the root of perception. Our culture insists on sexual uniformity and does not acknowledge any neutral differences — only crimes, sins, diseases, and mistakes."[1]

Written almost thirty years ago, Pat Califia's diagnosis of society's sexual chauvinism still applies in Canada to the more hardcore forms of BDSM (Bondage-Discipline-Sado-Masochism, referred to broadly as "kink"), in practice and in pornography. While there are no laws that explicitly target BDSM activities or representation, Canadian courts have concluded that sex deemed too risky or rough can be criminalized under assault-related provisions,[2] and sexual representation that is deemed "violent", "degrading" or "dehumanizing" can be criminalized under obscenity provisions.[3] In both cases, consent to the activities does not immunize the practice or the porn from criminalization. The ostensible explanation for this interference with our sexual autonomy is harm reduction. And yet our culture tolerates a wide variety of risky and injurious non-sexual activities, from mixed martial arts to elective cosmetic surgery, while circulating a wide variety of brutal imagery and violent stories, from extreme horror films to depictions of genuine torture and killing.

What might account for this hypocrisy? I'm going to suggest that the answer lies in our society's paradoxical relationship to sex.

On the one hand, our society views sexual activity as special, requiring specific regulations and moral codes – an ideology that scholars have identified as sexual exceptionalism. On the other hand, sexual pleasure holds negligible worth within our culture's value-system, while sexual desire is often seen as a dangerous force – an ideology scholars have identified as sex negativity. Furthermore, feminist concern regarding violence against women and sexual objectification has unfortunately been used to effectively advance kink-phobia in our laws. This article analyzes how these intertwining ideologies -- sexual exceptionalism, sex negativity, and certain branches of feminism -- have allowed judges to single out the risks and harms of BDSM, while ignoring the pleasure interests of kinky practitioners and porn viewers. In the course of my analysis, I will review three key areas that impact BDSM rights -- rough sex, advance consent to sex while unconscious, and kinky porn -- and compare the indicted activities to analogous non-sexual activities and representations.

Sexual Exceptionalism

Sex is seen as exceptional by law and society. From a conservative religious standpoint, married heterosexual couples should be the only ones entitled to sex, and in some faiths, only for the purposes of reproduction. Although secular society may have left such explicit strictures behind, sexuality is still seen as a rule-bound, morally-fraught activity. We can observe this in the concept of "virginity," which suggests a fundamental ontological (and usually heterosexist) difference between those who have and have not had sexual intercourse.[4] Furthermore, sexual exclusivity is constructed as the highest expression of romantic love -- it is what it means to be "true", "committed", and "faithful" to one's partner. From a legal standpoint, sexual assault has been targeted as a particularly heinous crime, and carries with it a more severe maximum penalty than non-sexual assault.[5] Accordingly, sexual harms are viewed as more traumatizing and qualitatively different than other types of harms, because of their putative political, symbolic, psychic or physiological effects.[6]

Sex Negativity

While the right kind of sex (monogamous, marital, in-the-home, in-love...) is sanctified, sex in general is regarded with suspicion in our society; it carries with it a contaminating and corrosive force, unless purified by a higher purpose. Take the example of our current criminalization of sex work, which combines sexual exceptionalism with sex negativity. First, while we can purchase intimate services like child care, cleaning, massage and pubic hair waxing, buying sexual services is a crime. Our current laws, and some branches of feminism, cast all sex workers as victims who are being violated and degraded with every transaction.[7] Regardless of any claims by sex workers to agency, job satisfaction or pragmatic choice,[8] their non-sentimental relationship to sex is unintelligible, evidence of coercion or false consciousness. Meanwhile, sex trade

[1] Patrick Califia, *Macho Sluts: Erotic Fiction* (Boston: Alyson Publications, 1988)

[2] *R v Welch*, 1995 CanLII 282 (ON CA); R v JA, [2011] 2 SCR 440, 2011 SCC 28 (CanLII)

[3] *R v Butler*, [1992] 1 SCR 452, 1992 CanLII 124 (SCC); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120, 2000 SCC 69 (CanLII); *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2 (CanLII); *Criminal Code R.S.C.*, 1985, c. C-46 s. 161

[4] Hanne Blank, *Virgin: The Untouched History*, (Bloomsbury USA, 2007)

[5] *Criminal Code* sections 266 (Assault) v. s. 271 (Sexual Assault)

[6] Jessica Clarke, unpublished manuscript (on file with author).

[7] *Criminal Code* sections 286 (1) (purchasing offence), 286 (2) (material benefit offense), 286 (4) (advertising offence), 286(5) (immunizes from criminal liability those who sell their own sexual services regarding the part they play in purchasing, material benefit, procuring and advertising offences), 213 (1)(c) (communicating offense); "Factum of the Intervener Women's Coalition" (Ontario: Court of Appeal for Ontario, n.d.)

clients, who have the audacity to pay for sexual satisfaction without relational strings, have become a new category of criminal deviants, with some anti-prostitution extremists even analogizing them to rapists.[9] Another example of sex negativity is reflected in the current moral panic regarding youth 'hook-up' culture and sexting.[10] Young people who openly engage in casual sex without the expectation or even desire that it will lead to a relationship, or who share explicit sexual images for the pleasures of flirtation and exhibitionism, are seen to be engaging in inherently risky, self-objectifying and damaging activities. Sex for the sake of pragmatics or pleasure is thus viewed as inescapably problematic and, in some cases, justifiably criminalized.

There have been some important challenges to sexual exceptionalism and negativity, both socially and legally. In broader culture, swingers, self-identified 'sluts', and polyamorous-identified people challenge the idea that sexual activities should be the exclusive property of committed romantic couples, or that casual sex is an intrinsically harmful practice. Legal theorists have also pointed out some of the unintended consequences of treating rape as the worst form of violence, and characterizing sexual harm as an ineradicable psychic trauma. For example, Janet Halley argues that by treating rape as a violation that 'changes you forever', we instruct survivors to, in fact, never recover.[11] Finally, sex workers refuse to be objectified as brainwashed victims, demanding labour rights and empirically demonstrating that criminal laws based on sex negativity and sexual exceptionalism increase their risk of violence and social stigmatization.[12]

Rough Sex

Like sex workers, BDSM practitioners are also subject to protectionist laws that deny their agency and ignore their stated interests. The leading Canadian case that addresses the criminality of hardcore BDSM is the 1995 Ontario Court of Appeal decision, *R. v. Welch,* [1995] OJ No 2859, 101 CCC (3d) 216 (ONCA).[13] The facts involve restraint, hitting, and penetration of the vagina and anus, which caused extensive bruising and some rectal bleeding. It is important to note that while the accused claimed all activities were consensual, the complainant maintained they were completely not. Thus the nature of the activities -- whether it was consensual BDSM, or unmitigated sexual assault -- was factually contested. However, the answer to that factual question was ultimately irrelevant. This was because, as a matter of law, the trial judge instructed the jury that, "consent is no answer to a charge of sexual assault causing bodily harm, when actual bodily harm is objectively foreseeable and caused."[14] The Court of Appeal agreed. Writing for the Court, Justice Griffiths cited *R v Jobidon*, [1991] 2 SCR 714,[15] the precedent-setting case that established consent is not a defence to the infliction of bodily injury in the context of a fistfight, and found that the same rule should apply in the context of consensual sexual activity. At the same time, he distinguished sex that causes bodily injury from other socially-sanctioned activities that can also cause injury, like rough sports.

Justice Griffiths justifies this approach through sex negative and sexual exceptionalist reasoning. First, he essentializes the meaning of injurious BDSM sex by positing that consent will not erase "the inherently degrading and dehumanizing nature of the conduct."[16] The terms "degrading" and "dehumanizing" wield rhetorical power, but they are entirely subjective and morally-laden. First, the judicial use of these terms assumes their pejorative nature. But for submissive BDSM practitioners, feeling degraded and dehumanized may actually be the point of the sexual encounter; it's precisely what makes them hot and happy. As for dominant BDSM practitioners, providing degrading and dehumanizing treatment *that is wanted and enjoyed* will be what satisfies them. But even if we assume that these words, by definition, convey unwanted experiences, what is degrading and dehumanizing to you may be empowering and dignifying for a sadomasochist. Unfortunately, because of our prevailing sexual ideology, the law does not feel compelled to protect and foster such diverse erotic pleasures.

Furthermore, pleasures that deviate from the norm are rendered not only worthless, but dangerous. The judicial disregard of sexual rights is accordingly justified by claiming there are "compelling societal interests" that trump autonomy. The exact interests at stake are never fully articulated, except for a vague inflammatory claim that if we allow hardcore BDSM, we might end up in a society of "would-be sadists." Here Justice Griffiths betrays his ignorance of BDSM, assuming that dominants are equivalent to non-consensual sadists, and that a person who derives "sexual gratification" from bestowing *desired* pain would also derive pleasure from meting out unwanted pain. Furthermore, if Justice Griffiths actually meant consent-respecting dominants when he refers to "would-be sadists," then he suggests that BDSM desires are alluring, maybe even contagious. He wants to prevent "normal" people from being contaminated by BDSM, and he's willing to use the heavy hand of the law to do so.

It is conspicuous that this use of the criminal law to prevent people from bodily harm does not apply to sporting activities. A closer consideration suggests that sex negativity and exceptionalism are at the source of the distinction, not an

[8] Leslie Ann Jeffrey and Gayle Macdonald, "'It's the Money, Honey': The Economy of Sex Work in the Maritimes," *Canadian Review of Sociology/ Revue Canadienne de Sociologie* 43, no. 3 (August 2006): 313–27; Victoria Love et al., *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada,* Sexuality Studies Series (Vancouver: UBC Press, 2013)

[9] Melissa Farley and Emily Butler, "Prostitution and Trafficking - Quick Facts," Prostitution Research & Education, 2012; Melissa Farley et al., "Men Who Buy Sex Have Much in Common with Sexually Coercive Men, New Study Shows," Prostitution Research & Education, 2015.

[10] R. Danielle Egan, *Becoming Sexual: A Critical Appraisal of the Sexualization of Girls* (Malden, MA: Polity Press, 2013); Lara Karaian, "Lolita Speaks: 'Sexting,' Teenage Girls and the Law," *Crime, Media, Culture: An International Journal* 8, no. 1 (April 2012): 57–73; Amy Adele Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* (University of Illinois Press, 2015).

[11] Janet E. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, N.J: Princeton University Press, 2006).

[12] Robyn Maynard, "Carceral Feminism: The Failure of Sex Work Prohibition," Robyn Maynard, July 15, 2012; Native Youth Sexual Health Network, "Indigenous Peoples In the Sex Trade – Speaking For Ourselves," INCITE! Blog, July 15, 2011; A. Krusi et al., "Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health among Street-Based Sex Workers in Canada-a Qualitative Study," *BMJ OPEN* 4, no. 6 (2014)

[13] *R v Welch*, 1995 (ON CA); "Amnesty International Publishes Policy and Research on Protection of Sex Workers' Rights," Amnesty International, May 26, 2016

[14] *R v Welch*, 1995 citing trial judge instructions.

[15] *R v Jobidon*, [1991] 2 S.C.R. 714, 1991 CanLII 77 (SCC)

[16] *Welch*, 1995 at para 88

empirical evaluation of the relative risks. For example, a meta-analytic review of mixed martial arts injuries found that 66.8%-78.0% of practitioners suffer head injuries, associated with concussions and degeneration in brain structures.[17] If we turn to a more "civilized" sport, like horseback riding, a study in British Columbia found that on average, three people die a year in that province alone due to equestrian activities.[18] These sporting acts are legal, even though there is evidence of substantial risk of serious injury or even death. Meanwhile, BDSM that causes relatively minor bodily harm is criminalized, in the absence of any documentation of the epidemiological risks of kink, or the number of serious injuries that ensue. While the *Welch* decision does not elaborate on why this would be so, it does cite *R v Brown*, [1993] 2 All ER 75 (UK High Crt), a British House of Lords decision which, in its full reasoning, differentiated boxing from BDSM. The former was celebrated as a "manly" pursuit, while the latter was condemned as "perverted" and "depraved."[19] Thus we see that society tolerates bodily injury incurred in the service of upholding dominant gender norms, but not bodily injury incurred in the pursuit of sexual pleasure.

Risky Sex

In *R v JA*, 2011 SCC 28, the SCC further circumscribed the sexual freedom of hardcore BDSM practitioners by disallowing advance consent to sex while unconscious. At trial, K.D. gave uncontested evidence that she and the accused, J.A., had engaged in erotic asphyxiation, with J.A. strangling K.D. until she lost consciousness for a few minutes, during which time J.A. inserted a dildo into her anus. K.D. maintained throughout the trial that she had consented to all aspects of these activities. However, the background facts are messy, as the couple had a history of domestic violence, along with their history of consensual kink. Furthermore, K.D. had previously given a contrary statement to the police, telling them the sex while unconscious had *not* been consensual. Feminist commentators have invariably been convinced that K.D. must have lied on the stand with regard to her consent to the anal insertion because she is cast as a "battered woman".[20] While I have argued there is some evidence that would support the truthfulness of K.D.'s trial testimony,[21] for the purposes of this discussion, it is important to focus on the legal question, as this

[17] Reidar P Lystad, Kobi Gregory, and Juno Wilson, "The Epidemiology of Injuries in Mixed Martial Arts: A Systematic Review and Meta-Analysis," *Orthopaedic Journal of Sports Medicine* 2, no. 1 (January 2014)

[18] J M Sorli, "Equestrian Injuries: A Five Year Review of Hospital Admissions in British Columbia, Canada," *Injury Prevention : Journal of the International Society for Child and Adolescent Injury Prevention* 6, no. 1 (March 2000): 59–61; see also C. G. Ball, "Equestrian Injuries: Incidence, Injury Patterns, and Risk Factors for 10 Years of Major Traumatic Injuries," *Am J Surg* 193, no. 5 (May 2007): 636–40

[19] *R v Brown*, [1992] 2 All E.R. 552 (U.K. High Court)

[20] Karen Busby, "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions," *Canadian Journal of Women and the Law* 24, no. 2 (2012): 328–58; Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R. v J.A," *Canadian Journal of Women and the Law* 24, no. 2 (2012): 359–88; Elaine Craig, "Capacity to Consent to Sexual Risk," *New Criminal Law Review* 17, no. 1 (January 2014): 103–34; Jennifer Koshan, "Sexual Assault and Advance Consent: A Feminist Judgment in R v JA," (forthcoming)

[21] Ummni Khan, *Vicarious Kinks: S/m in the Socio-Legal Imaginary* (University of Toronto Press, 2014)

"hard case" has created "bad law" across the board. Indeed, at the Supreme Court of Canada level, the only issue was the legal question: can one ever provide legally valid consent to sexual activity expected to occur during a period of unconsciousness?

The majority decision answered "no," and thus inscribed a prohibition that now applies not only to a hardcore kinkster trained in breathplay, but equally to a sleeping spouse who kisses her beloved awake. The majority rationalized this interference with sexual autonomy in large part because of the perceived risks involved. In particular, the majority was concerned with the risk that the conscious partner will purposefully or mistakenly deviate from the agreed-upon activities, during a time when the unconscious partner will be unable to monitor compliance. This ruling exemplifies paternalism and a sex negativity that understands that *protection from* the risk of sexual assault is more important than *freedom* to engage in desired sexual activities. Furthermore, it should be noted that for many kinky people, risk itself is erotic. The lover who is to be rendered temporarily unconscious may be aroused by the anticipation, and even the fear, of the impending unconsciousness, and/or the thrill of regaining consciousness in the midst of a sexual sequence. Risk and danger may thus be at the heart of the erotic exchange, and an integral part of the kink. But because sexual pleasure is the only interest being trampled, the Court does not even acknowledge the erotic liberty cost to its ruling.

Furthermore, it is important to mention that choosing which risks to single out as legally intolerable, and which to accept as part of life, reflects sexual morality, not empirical fact.[22] For example, the law allows patients to consent to unconsciousness with their doctor without a chaperone despite the fact that the medical community has identified doctor perpetrated sexual abuse of patients as a serious problem that plagues the profession.[23] A recent example is a former New York physician facing criminal charges for sexually abusing four patients, including one he is alleged to have overly sedated before ejaculating on her face.[24] Another high-profile case involves a Toronto anesthesiologist who was sentenced to ten years in prison for sedating and then sexually abusing 21 patients.[25] A recent article published in the Annals of Internal Medicine discloses more information about everyday sexual misconduct and demeaning treatment perpetrated by doctors on unconscious patients.[26]

We can therefore see that the risks involved for patients undergoing sedation are similar to those the Supreme Court flagged in the context of BDSM breathplay. In both cases, the doctor or the conscious BDSM lover might sexually assault the patient or lover by not sticking to what has been consented to, be it a medical procedure or a specific sexual activity. Moreover, the patient or unconscious BDSM lover will be totally unaware of the violation unless they revive while the assault is ongoing, or notice physical evidence on their bodies after the fact. While one might argue that we must allow medical sedation for doctors to perform life-saving procedures, this, of course, makes a moral claim that prioritizes medical health over sexual freedom. But even if we concede that medically-necessary treatment must be allowed, why do we permit people to undergo sedation for elective cosmetic surgery, like jaw augmentation or breast enlargement, and thus risk sexual abuse by their doctors? The reason can only be that in our culture, vanity is a more legitimate excuse than sexual pleasure to consent to injury and risk complications, sexual abuse, and even death.[27]

I resent this sexual exceptionalist stance. Many of us place much greater trust in our lovers and spouses than we do in doctors. But under the current laws, we are not only prevented from engaging in planned unconscious sex after erotic breathplay, but we are not even allowed to provide advance consent to casual sexual contact while the other is asleep. While I suspect this law is violated on a regular basis across the bedrooms of the nation, the judicial interpretation that has criminalized a kiss on a sleeping lover demonstrates the sex negative ideology that pervades our caselaw.[28]

Many feminist commentators support the *Welch* and *J.A.* decisions, not because they are morally opposed to rough or risky BDSM, but because, from their perspectives, the trial judges arrived at the correct verdicts. As stated, in both cases, there is information to suggest that the complainants did not, in fact, consent. Accordingly, a legitimate concern is that if you allow the "rough sex" or "advance consent" defence, the Crown will have to prove lack of consent beyond a reasonable doubt, and it will be harder to secure a conviction. Under the current regime, if injuries are sustained, or if the sexual contact happens while one is unconscious, the Crown will not be burdened with having to prove non-consent. At the same time, the corresponding reductions to legal autonomy are rationalized on the notion that so long as no one complains to police, consensual rough or risky BDSM practitioners will have nothing to fear. However, I believe this pragmatic approach to the law does not adequately take into account all the different ways that consensual BDSM practitioners can come to the attention of the criminal justice system. For example, BDSM

[22] Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (New York, London: Routledge, 1992).

[23] Christine E Dehlendorf and Sidney M Wolfe, "Physicians Disciplined for Sex-Related Offenses," *JAMA* 279, no. 23 (June 1998): 1883–88; Kevin Donovan, "Task force report on medical regulatory bodies kept secret over defamation concerns," The Toronto Star, July 13, 2016; Laura Armstrong, "Ontario health minister to review secrecy involving doctors," Toronto Star, October 10, 2014

[24] James C. Mckinley Jr, "Former Mt. Sinai Doctor Charged With Sexually Abusing 4 Women," *The New York Times*, March 24, 2016

[25] Alyshah Hasham, "Dr. George Doodnaught Sentenced to 10 Years in Prison for Sex Assaults on Women during Surgery | Toronto Star," *The Toronto Star*, February 25, 2014

[26] Anonymous, "Our Family Secrets," *ANNALS OF INTERNAL MEDICINE* 163, no. 4 (August 2015): 321, For example, a medical student recalls how he observed a doctor who rubbed the labia of an anesthetized patient with a cotton ball and then said, 'I bet she's enjoying this' while winking and laughing. In order to address patient vulnerability, one patient advocacy organization dedicated to addressing medical sexual misconduct suggests, "If you are going to be put under anesthesia, you should insist that you have a family member or a friend present for your procedure to protect you. Patients who are under anesthesia are very vulnerable because they have no control over what happens. Many patients are unnecessarily stripped naked for surgeries. One female hand surgery patient had her gown and underwear removed after she was put under anesthesia. The only reason she found out was because she woke up in middle of the surgery."

[27] "Liposuction Danger -- Death," *MedicineNet*, 2002; Dr. Nalini Chilkov, "25 Reasons Not To Get Breast Implants," *The Huffington Post*, February 1, 2011

[28] See, Joshua Sealy-Harrington, "Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent," *Canadian Criminal Law Review* 18, no. 1 (March 2014): 119

lovers might have consensual sex in public, they might make recordings that are discovered by third parties, or if they do require medical treatment, a doctor may report them to the police. Furthermore, as infrequent as it might be, not all complainants are always truthful. 'Always believe' may be a great slogan for activists, but it makes a terrible legal doctrine. Ultimately, this approach is vested in securing more convictions for sex offenders, no matter if a few BDSM practitioners get thrown under the bus to achieve this goal.

Kinky Text

Sexual autonomy encompasses not only the right to engage in kinky activity, but also to access representation that affirms and arouses us. Unfortunately, *R v Butler,* [1992] 1 SCR 452, the precedent-setting SCC decision that interprets the obscenity provisions, effectively deems BDSM text to be criminal. This is old law, but technically, it's still good law. In this case, the Court relied on a "community standard of tolerance" test, which asks if the community would tolerate others accessing the material, based on whether it is perceived to cause harm. The Court determined that representation of sex with violence, or that is perceived to exploit sex in a "degrading or dehumanizing" manner, will generally be found prima facie obscene. Obliterating the line between sexual assault and BDSM, the decision specifically states that representation of consent to activities deemed degrading or dehumanizing will not only fail to save the text, but in fact may amplify its obscene nature. Examples that the decision gives of "degrading" and "dehumanizing" themes include explicit reference to BDSM sexuality, such as domination, submission and pleasure from pain, along with some more common pornographic (and real-life) events, like women joyfully swallowing semen. Casting such a wide net, it is not surprising that the case law after *Butler* regularly deemed stories, films and even music with kinky themes to be obscene.[29]

As many have noted, criminalizing representation based on an assertion that "the community would think this is harmful" is really just a rhetorical sleight of hand that replaces morality with harm.[30] As the judges themselves admitted, there is no persuasive evidence to link porn with harm, nor any obligation for a trial judge to canvass what the "Canadian community" actually believes when determining if a text is obscene. Furthermore, if the perception is that violent text will desensitize the viewer, we must question why extreme horror films, dubbed 'torture porn' by aficionados, are not censored.[31] Even more disturbing, many mainstream horror films use camera angles to induce the viewer to take on the perspective of the killer.[32] The legality of such films demonstrates the sex negative perspective that the community is more accepting of entertainment that aims to titillate, shock or frighten, and even to invite identification with homicidal maniacs, than it is of material that aims to incite sexual arousal.

Sex negativity and exceptionalism also colour the "internal necessities" defence. Under that defence, a text that is otherwise sexually violent, degrading or dehumanizing can be saved, if it can be shown to have an artistic, literary or scientific purpose. But one might ask, why isn't a masturbatory purpose a sufficient defence? The moralistic reason lies in the Supreme Court`s decision to contrast texts that have "serious" intent and merit, and those that represent "dirt for dirt's sake." The judicial metaphor is telling. Both the representation of hardcore sexuality, and the pleasure it affords, are denigrated as "dirt." But if we understood sexual pleasure as a worthwhile right and a core aspect of our liberty, then a text that had arousal merit would be just as protected as one that has artistic merit.

It should be noted, however, that today, criminal obscenity convictions are rare, likely because the hypothesized link between porn and harm has been so thoroughly discredited. For example, the 2004 trial decision in *R v Price,* [2004] BCJ No 814 (BCPC),[33] acknowledged that the internet affords access to an unprecedented amount of hardcore material, yet there has been no documented increase in sexual violence since the advent of online porn.[34] There is also something absurd about targeting tangible pornography when anyone can access the same or 'worse' from any computer. Nonetheless, censorship of BDSM materials persists through Canada Customs seizures, as the two Supreme Court of Canada *Little Sisters* decisions show. Unfortunately, the cases also show a continued commitment to sex negativity and exceptionalism on the part of our highest Court. In the first decision, the gay and lesbian bookstore Little Sisters demonstrated that Canada Customs regularly seized BDSM texts headed to their store, even when the exact same books could safely arrive at mainstream bookstores, or were on the shelves at the Vancouver Public Library. While the Court acknowledged there had been discrimination at the implementation level, it largely upheld the underlying legal regime, and reaffirmed *Butler* as a precedent based on the harm principle. Writing for the majority, Justice Binnie further demonstrates kinkphobia, when he specifically singles out the portrayal of a dominatrix "degrading" a willing "sex slave" as dehumanizing and harmful, and thereby rightfully censored. In the second *Little Sisters* decision, the bookstore demonstrated overwhelming evidence that Canada Customs had continued its discriminatory targeting of Little Sisters, despite an earlier ruling that had ordered them to cease targeting gay and lesbian texts. The bookstore applied for an award of advance costs, to permit an appeal with respect to four books with queer BDSM themes deemed obscene by Canada Customs, and a systemic review of Customs' practices.[35] A majority of the Supreme Court ruled against Little Sisters, basically finding

[29] See for example, *R v Scythes*, [1993] O.J. No. 537 (Ct. J. (Prov. Div.)) (QL); *Glad Day Bookshop v Deputy Minister of National Revenue*, [1992] O.J. No. 1466 (Ct. J. (General Div.)) (QL); *R v Erotica Video Exchange Ltd.; R v Emery* (1991), 4 O.R. (3d) 344 (Ct. J. (Prov. Div.); *R v Emery*, [1992] O.J. No. 640; 8 O.R. (3d) 60 (Gen. Div.).

[30] Brenda Cossman, *Bad Attitudes on Trial: Pornography, Feminism, and the Butler Decision* (Toronto, Ont: University of Toronto Press, 1997); Leslie Green, "Pornographies," *Journal of Political Philosophy* 8, no. 1 (March 2000): 27–52

[31] Mark Trammell, "The Top 13 Torture Porn Flicks Actually Worth Seeing," *Film Equals*, December 6, 2012; Prominent examples include: *See Faces of Death* (1978), *Hostel* (2005), *The Human Centipede* (2009)

[32] See Bob Clark, *Black Christmas*, film (Warner Bros. Pictures, 1974); John Carpenter, *Halloween*, film (Sony Pictures Entertainment, 1978) and more recently Franck Khalfoun, *Maniac*, film (IFC Films, 2013).

[33] *R v Price*, [2004] B.C.J. No. 814 (Prov. Ct.) (QL).

[34] Statistics Canada, "Canada's Crime Rate: Two Decades of Decline," *Statistics Canada*, January 21, 2015; CBC News, "Police-Reported Crime Rate Falls to Lowest Level since 1969, Statistics Canada Says," *The Canadian Press*, July 22, 2015; Sarah Boesveld, "Sexual Assaults on the Decline but Are Still Severely under-Reported: U.S. Study," *National Post*, April 21, 2015; C. J. Ferguson and R. D. Hartley, "The Pleasure Is Momentary ... the Expense Damnable? The Influence of Pornography on Rape and Sexual Assault," *AGGRESSION AND VIOLENT BEHAVIOR* 14, no. 5 (September 2009): 323–29

[35] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2

that censorship of gay and lesbian BDSM material was not a matter of sufficient public interest. The Supreme Court thus sent a message that freedom of expression, and equality rights of gays and lesbians, are less worthy of protection in cases flowing from censorship of material produced for the purposes of sexual pleasure. Unfortunately, it appears this discriminatory sex negative censorship continues to this day. A review of the "Quarterly List of Prohibited Materials" published by Canada Customs shows that BDSM books, comics and DVDs continue to be targeted and prohibited from entry.[36]

Feminist legal interventions in these debates have evolved. Back in the early 90s, the feminist advocacy organization LEAF was firmly wedded to an anti-porn position. Its factum for *Butler* provided much of the "harm" discourse adopted by the Supreme Court, whereby kinky material was argued to violate sex equality -- particularly if women were portrayed as enjoying sexual submission or force. The LEAF factum for *Little Sisters* modified this position, perhaps in light of growing evidence that *Butler* was being used to disproportionately censor gay and lesbian material. The factum essentially argued that lesbian pornography supplied a specific affirmation and visibility function for the lesbian community, so should not be censored. As stated, the Supreme Court was not convinced. Today it seems that for most feminists, the pornography debate has been shelved for other, more contentious issues, like sex work. But the legacy of feminist anti-porn discourse unfortunately continues to provide ammunition to the claim that suppression of explicit sexuality -- specifically kinky sexuality -- will advance the equality rights of women.[37]

Fifty Shades of Sexual Autonomy

The criminalization and censorship of rough sex, risky sex and kinky text exposes how moralism infects our jurisprudence. In each case, we see that the law tolerates comparable rough activities, risky procedures and violent texts, so long as sexual pleasure is not the primary goal. Furthermore, the pragmatic policy approach, which assumes existing criminal laws will not capture consensual rough and risky lovers in practice, is not only unprincipled, but does not accord with my experience. Since my book on BDSM in Canada was published in 2014[38], I have been contacted every few months by a lawyer trying to assist a kinky client who is facing employment sanctions, the loss of child custody, or criminal charges, all because of BDSM activity said to be consensual. Most of these cases will conclude without being reported in a legal database, either because the type of case is confidential, or because the civil matters settle, or the accused accepts a plea bargain. As a result, it is hard to track the true discriminatory impact of our current legal regime. We need to also realize that kinkphobic discourse has far-reaching consequences on our cultural imagery that go beyond the specific issues addressed in the case law. For example, we might consider how anti-BDSM sentiment contributed to the vicious and misogynistic persecution of former Manitoba Justice Lori Douglas, simply because she had posed for kinky pictures for her husband.[39]

While the reaction to that incident may demonstrate that sex negative ideology is pervasive in our culture, surely our laws should not serve to further entrench it. Instead, we need to recognize that sexual autonomy includes not just protection from violation, or equality on the basis of gay, lesbian and bisexual orientation, but freedom to explore different sexual practices, either directly or through pornography. As with sports, or elective surgery, we should be granted the right to choose our own levels of sexual risk and injury. As with extreme horror films, we should be granted the right to choose what sexual media to consume. Indeed, for many of us, sexual pleasure is just as important as sporting activities, artistic appreciation or intellectual advancement -- if not more so! And if this sexual pleasure appears degrading, dehumanizing, too risky, or too rough for you, as Califia stated in the opening quote, it may be "beautiful, inspiring, and life-affirming" for me. It's time the law understood that there are many different shades of autonomy.

Photo: "Love Cuffs" (iStock.com/Alex Max)

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[36] Canada Customs does not publicly publish the list, but one can get an email with the list. See, for example, Prohibited Importations Unit, HQ, "Quarterly List of Admissible and Prohibited Titles" (Canada Border Services Agency, 2011)

[37] See for example, MP Joy Smith calling for a boycott of the film, *Fifty Shades of Grey* based on feminist objections to the film: Michael Woods et al., "Conservative MP Calls for Fifty Shades of Grey Boycott," *Ottawa Citizen*, February 14, 2015.

[39] *Supra* note 21.

[39] Chinta Puxley, "Former Manitoba Judge Compares Disciplinary Hearing to 'Torture,'" *CBC News*, January 5, 2016

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MAPLE RIDGE
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The City of Maple Ridge has an exciting opportunity where they are looking for the for the right fit to take on the newly created position of Executive Director, Legal & Legislative Services.

This is a rare opportunity to work as an Executive Director providing advisory services to the Corporate Management Team and overseeing a department that supports a broad range of legal and legislative services. This position offers strong potential for career growth and progression, as this is a rapidly developing area, and the City is one of the fastest-growing municipal bodies in the greater Vancouver area.

The Executive Director, Legal & Legislative Services will report directly to the Chief Administrative Officer, and work closely with the leadership team to provide professional and strategic advice on a full range of matters related to the City, as well as being called on to provide legal guidance to their Council and CAO. You will be a central point of contact for legal services for the entire organization, which includes providing sophisticated advice regarding the City's legal, policy, risk, and civic property management functions, as well as general corporate advice on an array of issues.

To be considered for this position you must be well-versed in provincial law governing the operation of municipal governments, with broad legal and policy experience gained while working in another public sector body. In this management position you must be a positive, solution oriented, and flexible individual. You will also have a track record of success in leading a team of diverse individuals, while demonstrating a collaborative and people-centered approach. You will also have at least 7 years of post-call experience, including a minimum of 3 years in a management position.

They are keen to look beyond the local market, and have asked to see Alberta candidates who are open to considering a move to Vancouver. For more information or to apply, please contact Mike Race or Amrit Rai at **LegalAB@zsa.ca** quoting reference #LM29963.
Any applications received by City of Maple Ridge will be forwarded to ZSA.

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

BY **KOREN LIGHTNING-EARLE**

This article was originally published in the Fall 2017 edition of Law Matters.

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

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

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

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

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

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

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

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

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

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

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

Photo: "Parliament Teepees" (iStock.com/Photawa)

KOREN LIGHTNING-EARLE is a lawyer at Thunderbird Law in Maskwacis, Alberta and a lawyer at the Wahkohtowin Law and Governance Lodge at the University of Alberta Faculty of Law. Koren was previously the Indigenous Initiatives Liaison at the Law Society of Alberta from 2017 to 2019.

I AM A MI'KMAQ LAWYER, **AND I DESPAIR OVER COLTEN BOUSHIE**

BY **NAIOMI METALLIC**

This article was originally published in the Spring 2018 edition of Law Matters.

My law school recently organized a panel on Gerald Stanley's acquittal in the death of Colten Boushie. Timing was such that the talk occurred two days after the Saskatchewan Crown announced it would not be seeking an appeal of the verdict. I was reluctant to participate on the panel, not because I wasn't interested in the subject, but because the case affects me in a deeply emotional way that most other topics do not (and I frequently speak on complex and difficult Aboriginal law and policy topics). I decided the only way I could talk about this was by getting personal and emotional, even though that is usually not my style. In the end, I am glad that I did. Many in attendance told me my remarks helped them to appreciate this case in a new way. So I thought I would seek to publish my remarks, edited slightly, in the hopes it may do the same for others.

I find it painful to talk about this case. Many other Indigenous people, especially my friends who also work in law, have expressed the same sentiment. A lot of us feel this case viscerally.

There are several Indigenous people I know, none of whom knew Colten Boushie personally, who wept upon hearing the news of the verdict. I felt a heavy weight of sadness over me for many days and I still do. Friends of mine described the recent news that the Crown is not appealing the verdict as hitting them as though they were punched in the stomach.

Those of us who are Indigenous and work in law are no strangers to being disappointed or angry with court decisions. But usually the reaction is not felt so personally or by so many of us. Why is it different here?

I can't speak for everybody, but I might say that as Indigenous people (and maybe especially those of us in law), it has threatened something deep within us. You see, as much as we know the past injustices and the ongoing injustices faced by our people, and the role the law has played and continues to play in this injustice, deep down there is hope that change is possible and is slowly happening.

We work hard, sometimes against significant resistance and barriers, to play a role in that change.

I think that the Gerald Stanley verdict has made many of us seriously question this hope, if not lose it altogether. To many of us, the verdict sent the message that our lives are not as important, and that many Canadians saw this case as placing defence of property above a human life. As Sen. Murray Sinclair asked in a poem he wrote after the verdict: Why does a farmer need a handgun?

Many on the "property defence" side of the debate fail to see the bitter irony that the property in question here are lands from which Indigenous groups have been displaced through colonization that often involved state manoeuvres like coercion, starvation, disease and treaty promises that were subsequently ignored. Not to mention the fact that this displacement continues to result in many Indigenous peoples in Canada, and certainly in Saskatchewan, being marginalized and poor.

Increased anti-Indigenous vitriol that appeared in some media and online sources in the days that followed the verdict have further threatened to erode that hope I spoke of, as did the news two weeks later of the acquittal of Raymond Cormier in the death of Tina Fontaine and the recent news that neither Saskatchewan nor Manitoba is going to appeal either verdict.

I am not a criminal law expert. Many who are more knowledgeable than me in this area say that it's extremely difficult to appeal jury verdicts, unless there was a clear error in the charge to jurors. Maybe so, but there are so many problematic aspects of the Boushie case that it is hard to accept this is the end of the matter.

They include:

The jury's composition and the role of peremptory challenges

Much has already been said about the how the use of peremptory challenges to exclude Indigenous jury members without any explicit reasons is deeply troubling in a legal system that recognizes there is deep-seated racism in many corners of our society that can infect a jury pool.

Peremptory challenges have received most of the media attention in this case, but there are many more.

Jury rolls and obligations to ensure they're representative

There were strong recommendations on the need for juries to be representative of Indigenous peoples in the 2013 Iaccobucci Report, but the Supreme Court of Canada chose not to affirm them in its 2015 *R v Kokopenace* decision, dismissing the argument that the state has an obligation to ensure a proportionately representative jury. I have been wondering if Supreme Court justices have been regretting their decision since the Stanley verdict.

The conduct of the RCMP

The way in which the RCMP treated Colten Boushie's mother and family members when they broke the news is shocking. More than a dozen officers, many with guns brandished, searched the family's trailer as if Colten was the suspect, telling his mother who was in a heap crying to "get yourself together" and asking her: "Have you been drinking?". There was no comfort. There was no empathy.

The length of time it took police to charge Stanley, and how they reported on the events, has been criticized as likely creating an impression in the minds of some community members (who would become jury members) that the police believed in Stanley's innocence.

There is also the fact that the RCMP lost track of the SUV Colten Boushie died in before the defence had a chance to have it independently analyzed. I don't understand how that could happen.

Other negligent investigative practices have been alleged, including the failure to protect the crime scene or to do a proper blood splatter analysis. And then there's the private RCMP Facebook page where one officer wrote: "I'm sorry the kid died but he got what he deserved."

The background of the judge

The past history of the judge in the case, Martel Popescul, Chief Justice of Saskatchewan's Court of Queens Bench, has also raised questions. As a lawyer in 1992, Popescul was lead counsel for the RCMP in a 1992 case where an alleged RCMP informant, who was the leader of a white supremacist group, murdered a First Nations man. In a later public inquiry into the role racism played in the man's death, Popescul sought to prevent key witnesses from testifying at the inquiry, arguing that RCMP informants might be exposed. Given this history, some have questioned why Popescul didn't recuse himself from the Stanley case.

The role of the prosecution

I don't have all the details about how the prosecution handled this case, but the fact that Stanley was acquitted entirely, and the jury did not find guilt on any of the lesser but included offences of manslaughter or criminal negligence, leaves questions about how strongly the prosecution pursued conviction. Some Indigenous leaders have alleged the Crown bungled the case. The accused can and do make arguments of ineffective counsel, so why isn't there an equivalent for victims and their families in the case of the Crown?

It's also noteworthy that the provincial government declined the Boushie family's requests for an out-of-province lead investigator and Crown prosecutor.

Deep racism, stereotyping and victim-blaming

It's clear from the RCMP Facebook post and other social media commentary that many people blame Colten for his fate. We don't have the castle doctrine in Canada, and yet many people have argued that Stanley was justified in his actions because Colten or his friends were trespassers on the farmer's property, or possibly trying to steal an ATV (which is not clear).

It reminds me of how Nova Scotia's Donald Marshall Jr., even after the Mi'kmaq man was completely exonerated, was blamed for his own wrongful conviction based on the questionable narrative that he had attempted to rob someone with a friend. This view was even shared by the Nova Scotia Court of Appeal, who commented that: "Any miscarriage [in the case was] more apparent than real."

Even if Colten's friend was attempting to take the ATV, it justifies nothing.

There was another case in 2011 where an Alberta man shot, but did not kill, another man trying to steal his ATV, and he was at least convicted of criminal negligence.

Much to question

From my perspective, there is much to question here.

I don't know what's going to happen next. Do we need a royal commission? How many royal commissions and inquiries have we already had that recommend solutions to problems that presented themselves once again in this case?

Perhaps there are factors here that reveal new problems that must be probed. But there's also clearly a failure to implement many previous recommendations that have already been made. This includes recommendations from the Manitoba Justice Inquiry, the Royal Commission on Aboriginal Peoples, First Nation Representation on Ontario Juries, the Commission of Inquiry into the death of Dudley George, the Commission of Inquiry into the death of Neil Stonechild and the Royal Commission on the Wrongful Conviction of Donald Marshall Jr., to name a few.

Currently, there is a team of scholars that have taken it upon themselves to research a number of points raised by this case. It's called Project Fact(a). They are hoping to release their first set of findings in April 2018. I hope they are listened to.

I wish I could end on a more hopeful note. But I don't really have it in me.

This article was first published by The Conversation (https://theconversation.com/i-am-a-mikmaq-lawyer-and-i-despair-over-colten-boushie-93229).

Photo: "Weight scale of justice, lawyer in background" (iStock.com/simpson33)

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#METOO: **THE RETURN OF THE VICTIM?**

BY **TUULIA LAW**

This article was originally published in the Fall 2019 edition of Law Matters.

Contemporary feminists have made some important critiques of the mainstream feminist movement of the 1970s and 80s that is often referred to as the second wave – among them the generalization of women's experience that does not reflect the experiences of racialized and poor women, and relatedly, the ongoing discrediting of unconventional women in criminal justice responses to sexual assault. Yet there remain some striking similarities to earlier feminisms in public and activist discourse around sexual harassment and assault. For example the emotionally arresting image of the woman victim of sexual violence – strategically mobilized by feminists campaigning to change sexual assault laws in the 1970s – is one we continue to see today on textbook covers and in awareness campaigns by anti-violence organizations: she is visibly bruised, filled with terror, alone, and often conventionally attractive and white – a decontextualized, ideal woman victim. And while feminists in the 1970s spread awareness about and shared their experiences of sexual assault through consciousness raising groups, the #MeToo movement can be seen as a similar contemporary feminist project. Perhaps in most ways except its dissemination through online social media, the #MeToo movement resembles consciousness raising insofar as it aims to highlight the prevalence of sexual violence.

As part of this, the #MeToo movement invites first-person accounts to amplify the voices of survivors. Presented as an improvement on the term 'victim' and an important recognition of having gotten over a hardship, the term 'survivor' has been wholeheartedly embraced in contemporary feminism. Although it is meant to emphasize resilience and suggest that sexual assault is something that can be gotten over, I question whether its application in the #MeToo movement and other activist and support contexts is, in practice, any different in meaning than 'victim'. The word survivor is of course important to people in their own sense-making processes but, like victim, it remains a basis on which to claim sympathy and recognition that renders the (self-)labeled an object of pity – a master status that eclipses all other aspects of a person's identity. The preference for this term, and the meanings it suggests, may also exclude or render those who have been sexually victimized but do not wish to identify with this experience vulnerable to criticism as irresponsible feminist or political subjects.

From this perspective #MeToo can be seen as a symptom of what David Garland has called the return of the victim, a cultural turn in which "the interests and feelings of victims... are now routinely invoked in support of measures of punitive segregation" (2001: 11). We have seen this in the proliferation of pseudo-criminal justice responses to sexual violence on university campuses that erode the due process rights of accused persons in attempting to centre survivors at the same time as they allocate far more emphasis and resources on responses than prevention. As a professor teaching on the subject of sexual violence, I remember being consulted by a student group whose contribution to the institution's consultation process called for stronger measures to compel accused who were no longer students to participate in the process (notably in focusing on punitive sanctions they had neglected to consider that this fell far outside of the university's enforcement capacity). Thus, in some respects student activism echoes the #MeToo movement's tendency to call out, shame, and call for punitive consequences for individual men. However, after a few years of seeing these policies in action, students' responses may have become less punitive: I was somewhat surprised to see some students agreeing with my request for more actionable restorative justice options in the sexual violence policy review process at my current institution.

The latter example speaks to the reflection and discourse that #MeToo has generated. On one hand, it has been a reminder of feminism's dark regulatory underbelly – yet another instance in which legal responses are proffered as a solution to an issue rooted in intersecting social inequalities. But on the other hand, #MeToo has generated self-reflection amongst men, and a growing critique of conventional responses. Although it is easy to assume that Twitter is an effective awareness raising platform, I became aware of the former when a male friend told me that even as a bisexual man, #MeToo had made him wonder if some of the encounters he had had with women in his twenties were entirely consensual. Fueled by this self-reflection he disagreed with my suspicions about consent-based education as the preferred prevention tool for university students – the basis of my ongoing qualitative study of how students mobilize what they have been taught through university prevention efforts in their sex lives, and through which I have begun to see the continuing effects of conventional sexual scripts on even young adults' expectations of sexual interactions. These preliminary findings relate to both of our reactions to #MeToo: reflecting my discomfort with the emphasis on victims/survivors and its perpetuation of women as sexual objects to be acted upon, young women still expect men to make the first move; but aligning with my friend's unsettling second look at some of his past encounters, young men appear to be increasingly concerned about consent, though as with their women counterparts communicating their desires remains awkward.

Amidst the private and public debates about sexual violence and consent occasioned by #MeToo, a 2018 study by the Canadian Women's Foundation found that Canadians' understanding

A BOLD CHANGE TO **A BASIC CONSTITUTIONAL TEST**

BY **RICKI-LEE GERBRANDT**

This article was originally published in the Spring 2020 edition of Law Matters.

In the recent *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 ("GGPPA Reference") on the federal *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*"), the majority of the Court of Appeal (Fraser CJ, Hughes and Watson JJA) assured its readers that it was not wading into the myriad of political issues evoked by the reference. Instead, they were asked only to opine on whether the federal government has the constitutional jurisdiction to enact the *GGPPA*. The Court's significant departure from existing constitutional law doctrine may to some readers render those assertions less convincing. They do, however, provide for a fascinating read.

The majority found the *GGPPA* wholly unconstitutional, in a treatise of a judgment explaining why the federal government is without any authority to legislate in regard to "GHG emissions"—even holding that the federal government's attempt to do so was "constitutional chutzpah". Wakeling JA's concurring opinion was replete with hypothetical analogies of British Columbia pine beetles threatening Alberta and a meteor explosion over Northern Quebec (both examples purporting to explain when the federal government can't validly enact legislation). The lone dissent of Feehan JA found the *GGPPA* constitutional.

The SCC was set to hear the Reference question in early March 2020 from the judgments of the Ontario and Saskatchewan Courts of Appeal, where the majority in both courts found the *GGPPA* constitutional. As that hearing was sidelined as a result of the coronavirus pandemic, the Alberta Court of Appeal decision may yet directly end up before the SCC on appeal.

What the *GGPPA* Does

The *GGPPA* provides for minimum standards of price stringency for certain items producing GHG emissions. It would only apply if a provincial law did not meet these minimum standards. If a provincial law did not meet these minimum standards, the *GGPPA* would apply in that province. The *GGPPA*'s aim is to alter the behaviour of Canadians and enterprises to produce less GHG emissions, invest in cleaner technology, or pay to keep producing GHG emissions. The hope is that this will help Canada lower its cumulative GHG emissions, allow Canada to perform international climate change treaty obligations, and thereby help ameliorate global climate change.

National Concern Doctrine and Characterization of the Law

For the federal government to have the constitutional jurisdiction to enact such a law, it would have to fall under the "peace, order and good governance" clause ("POGG") in section 91 of the *Constitution Act*, which confers on Parliament the power: "... to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces...".

There are three branches of POGG: (i) the gap (residual) branch, (ii) the emergency branch, and (iii) the national concern branch. The federal government in the *GGPPA* Reference argued that the national concern branch of POGG permitted it to enact the *GGPPA*. For a matter to qualify, the SCC in *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 held that a matter of national concern must:

- have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern"; and

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continued from p.28

of consent has slightly declined since 2015 – 28% of survey respondents reported they fully understood what it means to give consent in 2018 as compared to 33% in 2015. Though counterintuitive this may be a sign of reflexivity occasioned by public discourse surrounding accounts like that of the woman who felt pressured by American actor Aziz Ansari to engage in sexual activities, similar to the fictional young woman's narration of what was overwhelmingly publicly interpreted as an exploitative sexual encounter in the short story *Cat Person*. In both accounts, the encounter was neither clearly violent nor clearly non-consensual, but the women certainly did not participate enthusiastically. The women's limited sexual agency and capacity for expression in each situation, and also the public response calls to mind critiques by dissident, sex positive feminists in the 1980s that we would do well to remember in the contemporary context of #MeToo: as Carol Vance eloquently argued, focusing exclusively on danger invisibilizes women's sexual pleasure, "overstates danger until it monopolizes the entire frame, [and] positions women solely as victims" (1993: 290). In other words, now that another generation of feminists have exerted considerable energy publicizing the message that sexual violence is prevalent, perhaps it is time to move on from sexual danger to ask, what strategies can we undertake to equip women to be sexual agents and men to respect them as such?

References:

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Vance, C. S. (1993). More danger, more pleasure: A decade after the Barnard sexuality conference. New York Law School Law Review, 38, 289-317.

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- a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".
- In the same case the SCC recognized the relevance of "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter".

This test has led to significant disagreement across the three Courts of Appeal that have assessed the constitutionality of the *GGPPA* as to the proper "characterization of the law".

To determine whether a government has the constitutional jurisdiction to enact the challenged legislation, the court: first assesses the pith and substance of the law (by looking at the purpose and effect of the challenged legislation) to characterize the "matter"; and second, it "classifies" the "matter" under the jurisdiction of either the provincial or federal government. How the matter is characterized drives its classification; in a sense everything turns on characterization.

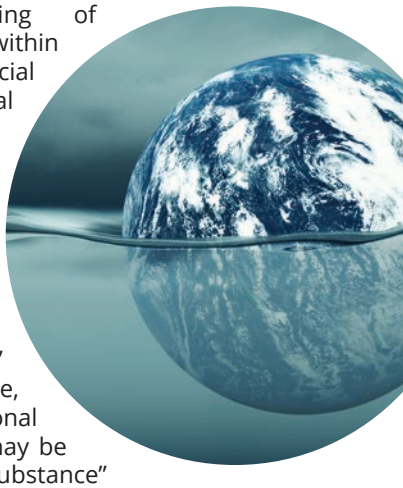
Although the federal government sought a narrow characterization of the *GGPPA* ("the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions"), which would in turn narrowly confine federal jurisdiction to legislate in regard to that subject matter, the majority found that the Act was not narrowly confined, but broadly encompassed the regulation of "GHG emissions". As such, the *GGPPA* could not be classified under the POGG power because it did not have the requisite "singleness, distinctiveness, or indivisibility" or "scale of impact" on provincial jurisdiction that can be reconciled with the division of powers in the Constitution.

Significant Changes to Constitutional Law Doctrine

The reasons for the majority suggest a bold change to the national concern doctrine—and it will be interesting to see if the SCC chooses to tackle it.

Prior to analyzing the national concern test as set out in *Crown Zellerbach*, the majority adds a gatekeeper step to the national concern doctrine. Before the national concern test can even be engaged, the province must have no jurisdiction over the "matter" of the impugned Act (here, "GHG emissions") under any provincial head of power except for section 92(16) which is "Matters of a merely local or private nature in the Province". The rationale for this change, according to the majority, is that only matters of a merely local nature could be transformed into matters of a national concern—the other specified heads of provincial power can never be. The majority reasoned that if the Fathers of Confederation wanted the federal government to have jurisdiction over provincial matters that subsequently became of national concern then they would have said so. (What the majority failed to deal with convincingly was the jurisprudence that has already rejected this view. And if the Fathers of Confederation wanted POGG to apply only if matters fell within section 92(16) and no other, they could have said so too.)

At its heart, the majority's point is this: the POGG head of jurisdiction, and the national concern doctrine in particular, cannot be wantonly expanded so as to oust provincial jurisdiction — otherwise the division of powers in Canadian constitutional democracy collapses. What the majority did not address is the reality that section 92(16) has rarely been used as the sole basis for provincial power in constitutional jurisprudence — because most matters fall within a more obvious provincial head of power. It is therefore questionable whether anything of substance could fall purely within section 92(16) but no other provincial power, severely restricting federal jurisdiction over a matter pursuant to the national concern doctrine. Perhaps this was the majority's (unstated) point?



Wakeling JA's concurring opinion also makes a bold change to the basic constitutional test. He abandons the "pith and substance" language, calling it unfortunate, archaic wording that constitutional lawyers are wont to use (which may be an apt conclusion: "pith and substance" does have a delightfully esoteric ring) but doesn't address the fact that the "pith and substance" test has been the fundamental constitutional test for characterizing a law for over a century. He instead asks whether the impugned law "displays features" of a law that justify its classification to provincial and federal jurisdiction and compares the "importance of the interests" of the aspects of the law (unless jurisprudence has already undertaken that task and resolved the conflict). This is a novel alteration of the fundamental characterization and classification test.

Feehan JA was the only justice to find the *GGPPA* constitutional. The straightforward modesty of his approach simply underscores how much of a departure from orthodoxy the majority made. He applied the straight-forward pith and substance characterization test, and the national concern doctrine as it has been developed in prior jurisprudence. With that said, he provides little analysis of the effects of the *GGPPA* (failing to consider whether the extrinsic and intrinsic evidence suggests it impedes provincial jurisdiction). The SCC will not be able to avoid this issue and will have to tackle it head on.

Going Forward

How the SCC deals with the majority's new proposal to change the test, and how it will structure the national concern doctrine going forward will, potentially, be pioneering since there is little jurisprudence concerning the national concern doctrine as it is. And as the world continues to become even more interconnected and various collective action problems arise, it is likely that more of these division of powers issues will appear as new concerns threaten not just a single province or the nation, but the entire world.

The author is indebted to the research assistance of Isabelle Lam. The opinion and any errors remain with the author.

Photo: "Rising Sea Level" (iStock.com/freie-kreation)

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2020-21 MEMBERSHIP RENEWAL

As a lawyer, you understand how important it is to innovate, stay on top of changes to the practice of law, and navigate challenges to prepare for the future. This year, the CBA has been at the forefront of our profession with advocacy, professional development, tools and information to guide your practice through unprecedented times.

As a CBA member, you receive major savings and member-only benefits, such as savings on professional development programs. The CBA also gives you the power of Canada's largest association for legal professions, supports your practice during COVID-19 and helps prepare your practice for the future.

The CBA has also made it easier than ever to renew your membership. When registering, you can set up annual auto-renewal, or set up monthly pre-authorized payments. There are also special assistance programs which allow members who are on parental leave, taking a leave of absence, or are unemployed to save on their membership fee.

The current CBA membership year ends on August 31, 2020. Don't forget to renew your membership and continuing enjoying these benefits and more. Renew online by visiting www.cba.org/membership/join-renew.

DIGITAL LITERACY SERIES

The legal industry in Canada is not immune to the major technical trends transforming the world. Globalization and the rapid increase in the use of technology has already profoundly changed how we interact with each other.

Stay on top of tech trends and sharpen your focus with the new CBA Digital Literacy Series. This series consists of dynamic, on-demand videos from a panel of knowledgeable speakers.

Register online at www.cba.org/Futures/Fostering-New-Skills/Digital-Literacy-Series.

AFTER THE PANDEMIC PODCASTS

Tune into The Every Lawyer bonus series "After the pandemic" produced by CBA National in partnership with CBA Futures. Recent episodes feature Law Matters co-editor Joshua Sealy-Harrington speaking about COVID-19 and racial justice; Law Society of Alberta Deputy Executive Director and Director of Professionalism and Policy Cori Ghitter on fixing legal education; and a discussion about how COVID-19 could change the way we work in the legal sector.

Listen to The Every Lawyer and the "After the pandemic" bonus series at https://theeverylawyer.simplecast.com/.

LAWYERS FINANCIAL DEFINED BENEFITS PENSION

In 2016, a Lawyers Financial task force, comprised of leading pension and actuarial experts began investigating pension options. The result was a decision to join the CAAT Pension Plan to provide predictable and sustainable lifetime pensions for Canada's legal community through a defined pension plan - DBplus.

CAAT is an $13.5 billion not-for-profit trust that has been delivering secure lifetime pensions for over 50 years. In 2018 CAAT launched DBplus, a plan that allows private sector employers to join. DBplus combines the best features of DC plans (cost certainty) with the best features of DB plans (predictability and cost efficiency for employers and valuable lifetime benefits for members).

Through CBIA/Lawyers Financial, law firms of all sizes can now provide predictable, cost certain, cost effective, adequate and sustainable workplace pensions through DBplus. This option has none of the legal or financial risks associated with firms managing their own plans. The main law firm obligation will be to set up payroll deductions and remittances, just as they do now for CPP.

Visit lawyersfinancial.ca/pension/defined-benefit-pension for more information.

COVID-19 RESOURCE HUB

The CBA delivers support to its members to help them carry out their essential role. This support is more important than ever. We are committed to delivering current information and relevant support to you and your practice during the COVID-19 pandemic.

The resources on this portal will keep you up to date on what's happening in the legal profession and justice system and give you tools and tips to keep going professionally and personally.

Visit www.cba.org/Membership/COVID-19.

2020-21 SECTION REGISTRATION

In order to bring value to our members, we have made several exciting changes to our Sections for the coming year.

- **Section Membership Categories:** we now have only two option for Section membership - full or materials. All full Section members will have the option to attend any meeting in person (when in-person meetings resume), or by webcast.
- **Reduced Section Fees:** as a result of the COVID-19 pandemic, we have temporarily reduced all full Section registrations by $40, a discount that will be automatically applied when you register. Materials registrations are now available for no charge.
- **Webcast Drop-In:** for the first time, all active CBA members can now drop in and attend webcast meetings of any Section. The webcast meeting drop-in fee is $15.00 + GST.

Section registration is now open. The registration grace period runs from September 1 - October 31, after which point those who have not renewed their Section registration will be dropped from the Section lists. Don't forget to renew your registration before October 31 so you don't miss out on programming from your Sections of choice.

Read more about these changes and register for Sections on our website at www.cba-alberta.org/Sections/Section-Enrollment.

CBA ALBERTA LEADERSHIP FORUM

The 2020 CBA Alberta Leadership Forum series of webinars will be taking place this fall in October and November. We are welcoming an exciting group of speakers, including:

- **Diversity and inclusion in the legal profession**, featuring CBA National President Vivene Salmon and CBA Alberta Equality, Diversity & Inclusion Committee co-chair Lulu Tinarwo
- **How challenges related to equality and the pandemic have impacted self-represented litigants** with Professor Julie McFarlane
- **New technologies, court reforms and changes to the way lawyers practice** with Jordan Furlong
- Reform to court management and case flow management with Bruce Preston
- **Post-pandemic legislative and administrative court reforms** with Minister of Justice & Solicitor General Doug Schweitzer
- **Diversity and inclusion, and pandemic-related challenges at the courts** with Court of Appeal Chief Justice Catherine Fraser, Court of Queen's Bench Chief Justice Mary Moreau and Provincial Court Chief Judge Derek Redman.

The Leadership Forum is free of charge for all CBA members to attend. Registration information will be available in September.

CBA ALBERTA 2020-21 BOARD OF DIRECTORS

In June, we concluded the election for 2020-21, electing our incoming Secretary and filling the four available positions on our Board of Directors. Join us in congratulating our incoming Secretary Indra Maharaj, and new board members Aldo Argent, Sarah Goderre and Gillian Gamez. They will be joining the 2020-21 Executive Committee, comprised of President David Hiebert, Vice President Bianca Kratt, Treasurer Amanda Lindberg and Past President Ola Malik, as well as returning board members Jassmine Girgis, Patrick Heinsen, Robert Harvie, Q.C., Michelle Karasinski and Adam Norget.

Please join us in welcoming our incoming Secretary and board members. We also want to sincerely thank all those candidates who ran in the election this year. The strong slate of candidates that put their names forward are a credit to our membership and the profession, and we thank them for their time and participation.

DISTINGUISHED SERVICE AWARDS

Nominations are now open for the 2021 CBA Alberta and Law Society of Alberta Distinguished Service Awards. We invite you to nominate a deserving colleague for an award for service to the profession, service to the community, service to legal scholarship or pro bono legal service. The deadline to submit your nomination package is October 30, 2020.

The recipients of the Distinguished Service Awards will join a long list of esteemed past winners, including the 2020 recipients:

Service to the Profession: Steve Raby, Q.C.

Service to the Community: Meenu Ahluwalia

Legal Scholarship: Professor Jennifer Koshan

Pro Bono Legal Service: Robert W. Calvert, Q.C.

Visit www.cba-alberta.org/Distinguished-Service-Awards to download a nomination package today.

IN MEMORIAM: **LINDA CHAPMAN**

BY **LEE-ANNE WRIGHT**

Linda Chapman
B: May 4, 1956 (Woodstock, NB)
D: June 26, 2020 (Calgary, AB)

On Friday, June 26, long-term CBA Alberta team member Linda Chapman passed away after a 3-year battle with cancer. She is survived by her husband, Curtis Chapman, her son and daughter-in-law, Wayne and Jeanette Chapman, and her beloved grandchildren Colten and Kylie Chapman.

Born and raised in New Brunswick, Linda continued to visit the province each summer, often with her grandchildren, and planned on returning upon her retirement. Linda joined CBA Alberta in the summer of 1999 after moving to Alberta and has been the "face" of the Calgary office ever since. One cannot think about our Sections without also thinking of Linda.

Linda will be best remembered for the warm rapport she had with each CBA Alberta member that came through the door of the Calgary office, spoke to her on the phone, or sent her an email. She welcomed almost every member into the office by name, (gently) chastising those that she had not seen regularly and spending a few minutes catching up on the goings-on of their practice, their families, and their lives. So loved and appreciated was Linda that when CBA Alberta staff gathered a book of well-wishes from members for her earlier this year, the notes of support and appreciation took up over forty pages. In these pages, she is described as the "heart and soul" of the CBA Alberta. Many of the notes remark on her humour, readiness to share a laugh, and the work she put in every day to support CBA Alberta members and Sections.

Many CBA Alberta members may not be able to think of a time in their career where Linda has not been present. They first knew her as students or in the early stages of their careers and have gone on to become leaders in their firms, serve in leadership positions with the CBA, or move on to positions on the bench. Linda could always be counted upon to be a cheerleader for the CBA and was often the one to actively encourage members to consider giving back by volunteering on Section executives or committees. She has watched several "CBA babies" grow up and go on to practice law themselves. For so many, particularly those involved in Sections in Calgary, Linda has always been available to answer a question, and to provide guidance and insight.

For her colleagues at CBA Alberta, Linda was an invaluable source of knowledge. If you started a question with "Do you remember when…", Linda would have an answer for you in the form of an old file, email, or publication by the time you finished. She was always eager to help, whether she was sitting at the registration desk at the Alberta Law Conference, attending Law Day in Calgary, or making herself available to share ideas with. Linda was the first to wish you a happy birthday, organize gifts for Christmas, and ask you all about your weekend. She also gave the best hugs.

Outside of her work with the CBA, Linda was a devoted grandparent to Colten and Kylie. They were avid baseball players and talented members of their local youth dart club, and Linda would regularly share stories of their most recent successes with the rest of the CBA Alberta team. In the summers, Linda and Curtis would spend their vacations with their grandchildren, driving across Canada to visit New Brunswick or camping around Calgary.

Linda will be missed dearly by her friends – the CBA Alberta staff and members whose lives she has touched over the past twenty years. We will hold her memory close to our hearts and carry on her legacy by always having a warm smile and a ready laugh for those who need it.

A VIEW **FROM THE BENCH**

BY **JUDGE A.A. FRADSHAM**

Sometimes one is allowed to play to one's strengths. The email from the ever supportive Ms. Wright of the CBA editorial offices told me that the print edition of *Law Matters* was being retired in favour of an electronic version. Would I please write one last "View" as part of a retrospective issue? "Of course I will", I replied. "Retrospective", meaning "looking or directed backwards", is probably what I do best. As my long-suffering wife, Gloria, has often told me, "Allan, you were born old." And your point is...?

As I write this, we are all coming out of stringent lock-down, and are settling into a materially different version of "normal". A year ago, if I walked into a bank wearing a face mask, security might have been summoned. Today, if I walk into a bank without wearing a face mask, security might be summoned.

A year ago, the people most fastidious about wiping surfaces to eliminate evidence of touching were often those engaged in the break-and-enter vocation. Today, those who expend great effort cleaning away fingerprints are some of our most admired front line workers.

A year ago, if I went two months without a haircut, I looked unkempt and derelict. Today, well, I still look unkempt and derelict, but it is now with a discernible air of self-righteousness.

A year ago, if one picked up one's possessions from the curb, it usually meant one had been evicted from one's home. Today, curb side service is a marketing feature. Recently, I placed on an on-line order with a large box store, and received an email telling me to which parking lot I should attend and where I should park. When I arrived there, a sign told me a number to call to announce my presence. A young man hurried out of the store bearing my ordered item, placed it in my vehicle, quickly disappeared, and I drove away. I kept thinking that there was something very familiar about the whole transaction. Then I remembered: it was the same type of procedure described in many of the drug trafficking trials I have heard.

Since work often requires me to venture out of the house in any event, one of our new routines has me taking on the grocery shopping duties. This allows Gloria to reduce her public excursions and resultant exposure. Those advantages outweigh the dangers of me being let loose in the grocery store wandering the chips and snacks aisles unsupervised. Indeed, it is during such wanderings that I have been introduced to the new regime of directional arrows painted on floors and signs indicating where one may stand in the check-our queue. Maybe it comes with my current line of work, but I tend to take rules and directions rather seriously. It would seem that those engaged in other vocations are not similarly inclined. Or perhaps, they are all reincarnated salmon seeking a substitute for swimming upstream to a spawning area. Whatever the cause, their failure to obey the simple directions bespeaks either blind indifference or just general blindness. My immediate annoyance is somewhat assuaged by the realization that if they similarly conduct themselves in the outside world, my employment, and that of my successors, is well secured.

One final, and more meaningful, thought emerges from this somewhat dystopian time in which we find ourselves, and it fits into my assigned theme of reflecting on what we have enjoyed in the past. In the Court in which I sit, from the beginning of this new reality, we have maintained docket courts, bail hearings, in-custody sentencings, in-custody trials, and pre-trial conferences. However, except for the trial matters, often the judge and the clerk sit alone in a courtroom while lawyers and accused persons appear electronically. Though I understand the allure of "pants optional" court appearances, I do anticipate with some affection the return of lawyers, judges, clerks, and the public to the courtroom. All of us in law are engaged in a very human experience; we should firmly resist the siren song of some aspects of "electronic progress" if those new practices reduce us to a collection of disembodied voices and electronic images, exuding as much warmth as a hologram. While a telephone call or even a FaceTime communication may suffice when one is away from home, few would embrace it as a permanent and improved replacement for being there in person... mind you, it does insulate one from tasks such as taking out the garbage.

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

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IF YOU LOOKING TO RETIRE AND WORK PART TIME AN OFFICE SPACE TO RENT IMMEDIATELY. We are located in the Beltline Area, two blocks to the LRT. If you are interested, please call **Gregory Leia at gleia@wolffleia.ca or 403-870-0091.**

WILL SEARCH: We are seeking the Last Will and Testament of the late Richard Paul MacGregor of Calgary. **Please contact Macphail Harding, attn: Arlene Blake at 403-230-4617 x231.**

JUDICIAL **UPDATES**

COURT OF QUEEN'S BENCH

The Honourable Mr. Justice E.C. Wilson (Calgary) has elected to become a supernumerary judge effective May 11, 2020.

The Honourable Mr. Justice C.S. Brooker (Calgary) has retired as a supernumerary judge effective June 1, 2020.

Master A.R. Robertson, Q.C. (Calgary) has been appointed as an ad hoc master in chambers, effective June 1, 2020.

Denise J. Kiss has been appointed as a Justice of the Court of Queen's Bench of Alberta (Edmonton), effective June 3, 2020.

Sherry L. Kachur has been appointed as a Justice of the Court of Queen's Bench of Alberta (Calgary), effective June 3, 2020.

Thomas G. Rothwell, Q.C. has been appointed as a Justice of the Court of Queen's Bench of Alberta (Edmonton), effective June 3, 2020.

The Honourable Mr. Justice R.A. Graesser (Edmonton) has elected to become a supernumerary judge effective August 3, 2020.

PROVINCIAL COURT OF ALBERTA

The Honourable Judge Frederick C. Fisher (Medicine Hat) has been appointed as a part-time judge, effective June 5, 2020.

The Honourable Judge Derek G. Redman has been appointed as Chief Judge of the Provincial Court of Alberta, effective August 1, 2020.

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