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NOVEMBER 2021

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**PART 6**

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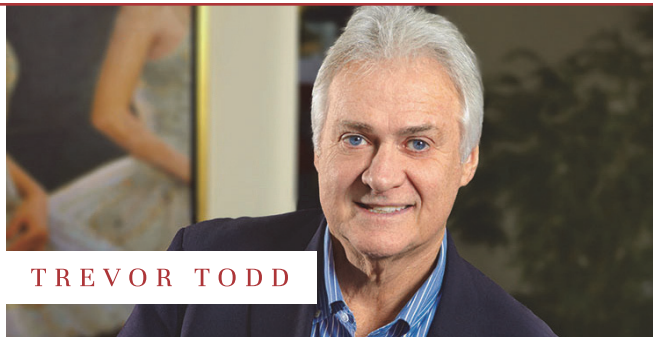
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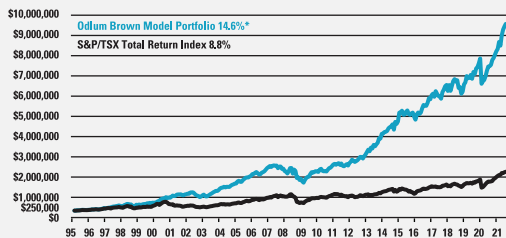
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## ON THE FRONT COVER

Clare Jennings is the new president of the CBABC. Lorne Phipps profiles her and her various stints in Smithers, Burnaby, Terrace, Regina, Ghana and Germany starting at page 819.



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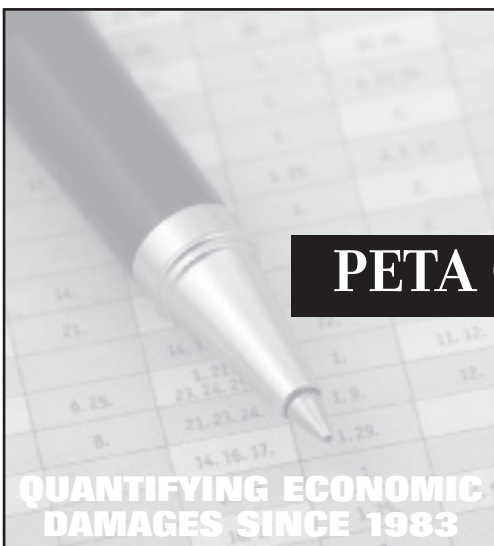
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# ENTRE NOUS



Our *Entre Nous* of March 2019<sup>1</sup> noted the gulf between the Canadian legal system, based on the rule of law from which Meng Wanzhou would benefit, and the legal system of China, in which Michael Kovrig and Michael Spavor were by that point ensnared. Accordingly, we resisted labelling China's arrest of the "two Michaels" shortly after Meng's in Canada as "tit for tat", with its connotation of equivalence.<sup>2</sup>

In late September 2021, Meng and the "two Michaels" returned, with much fanfare, to their respective home countries. What unfolded between their respective arrests and release was predictably far different in China than in Canada.

How the case unfolded in Canada is consistent with the rule of law, as foreshadowed in our March 2019 *Entre Nous*. How the parallel cases of the "two Michaels" unfolded in China confirmed its legal system is, to put it politely, based on very different principles.

As is now well known, on December 1, 2018, the RCMP arrested Meng, a Chinese citizen and Huawei's chief financial officer, at Vancouver International Airport while she was en route from Hong Kong to Mexico, before she could board her connecting flight. The arrest was made pursuant to a U.S. request under the *Treaty on Extradition between the Government of Canada and the Government of the United States of America* (the "Extradition Treaty"). The United States sought Meng's extradition for prosecution in the Eastern District of New York in relation to conduct that was said to be equivalent to fraud as described in s. 380(1) of the *Criminal Code of Canada*.<sup>3</sup>

Much might be debated in relation to U.S. motivations, the breadth of its underlying laws, whether it should have put Canada in the position it did and the manner in which the arrest was made. However, what is apparent is that before the Canadian courts, Meng received fair process.

A judge of the Supreme Court of British Columbia (Ehrcke J.) granted bail<sup>4</sup> and, until her departure from Canada, Meng was permitted to reside



in substantial homes on Vancouver's west side. Although with an ankle bracelet and with a security detail, Meng was apparently even able to go shopping and attend pre-COVID concerts.

In the process of combatting her extradition, Meng accessed Chinese representatives in Canada and a large Canadian legal team. She repeatedly sought, and sometimes obtained, relief from Associate Chief Justice Holmes of the B.C. Supreme Court, including as follows:

- Meng successfully applied for disclosure in support of a branch of her allegation of abuse of process (that Canada Border Services Agency officers misused their customs and immigration powers) (2019 BCSC 2137);<sup>5</sup>
- Meng (and the Attorney General of Canada) successfully opposed a media consortium's application to video record and broadcast the "double criminality" portion (dealing with whether the conduct for which extradition was sought would amount to a criminal offence under Canadian law if it had taken place here) of the then-pending committal hearing (2020 BCSC 43);
- the court denied Meng's request for an order discharging her from the extradition process on the basis that, she argued as a matter of law, the "double criminality" requirement for extradition could not be met (2020 BCSC 785);
- Meng requested a determination of whether claims of privilege (which were largely upheld) were made out in documents (or portions of documents) withheld from disclosure by the Attorney General of Canada in the extradition proceedings (2020 BCSC 1461);
- Meng was partially successful in her first application under s. 32(1)(c) of the *Extradition Act* to adduce evidence at her extradition hearing, and successful in defeating the Attorney General's application for dismissal of the third branch of her proposed stay application based on abuse of process (alleging that the requesting state deliberately misstated or omitted material evidence in the record of the case on which it would rely in seeking Meng's extradition) (2020 BCSC 1607);
- Meng's second application to adduce evidence, seeking to adduce six items of evidence in the extradition hearing to challenge the reliability of a second supplemental record of the case, had mixed results (2021 BCSC 440);

- Meng's third application to adduce evidence in the extradition hearing (this time the affidavit of an accountant with Huawei) was unsuccessful (2021 BCSC 514);
- Meng successfully applied for an adjournment of portions of the extradition proceedings, to allow her counsel time to receive and review a substantial amount of documentation that HSBC (the alleged victim of the fraud with which Meng was charged in the United States) had recently agreed to provide (2021 BCSC 935);
- Meng was unsuccessful in her application for an order banning the publication of the content of documents she received from HSBC and filed with the court; the terms on which she had received the documents required her to apply (2021 BCSC 1253); and
- Meng's fourth application to adduce evidence (the recently received HSBC documents) in the extradition hearing was not successful (2021 BCSC 1412).

The extradition hearing before Holmes A.C.J. concluded in mid-August 2021, with the judge reserving judgment.

As is now also well known, Meng was allowed to leave Canada on September 24, 2021, before a court judgment stemming from the merits of that hearing could be released. This was less than fully satisfactory to those who had looked forward to a court decision that might both, (1) in coming from our court rather than a political source, reaffirm the centrality of the rule of law, but (2) in the substance of its reasoning and result, rebuke the United States in some way, result in the release of Meng to China, and thereby still set the stage for the release of the "two Michaels". Of course, there was no guarantee that this (rather than a decision allowing extradition) is the decision that Holmes A.C.J. ultimately would have reached, though much had been read into the judge's question to counsel for the Attorney General of Canada during the August 2021 hearing: "Isn't it unusual that one would see a fraud case with no actual harm many years later and one in which the alleged victim — a large institution — appears to have numerous people within the institution who had all the facts that are now said to be misrepresented?"<sup>6</sup>

However, while the process did not end with the flourish of a Canadian court decision on the substance of an outstanding extradition request, the process nevertheless worked its way through the courts of both the United States and Canada, in accordance with the Extradition Treaty.

In this regard, Meng entered into a deferred prosecution agreement and formally pled not guilty in a virtual appearance before a U.S. court on September 24, 2021. U.S. District Judge Ann Donnelly accepted the terms of



the agreement.<sup>7</sup> Despite the not guilty plea, as part of the deferred prosecution agreement Meng was required to make certain admissions that, it is said, may assist the United States in its case against Huawei.

As Canada's Department of Justice described it, there was then a case management conference before Holmes A.C.J. in which the department "informed the [B.C. Supreme] Court that on September 24 the US Department of Justice withdrew their request for Canada to extradite Meng Wanzhou to the United States. As a result, there is no basis for the extradition proceedings to continue and the Minister of Justice's delegate has withdrawn the Authority to Proceed, ending the extradition proceedings."

The Canadian Department of Justice noted in its news release that "[t]he judge released Meng Wanzhou from all of her bail conditions. Meng Wanzhou is free to leave Canada."<sup>8</sup>

In the court appearance, which reportedly lasted less than 15 minutes, Holmes A.C.J. is reported to have said directly to Meng: "You have been cooperative and courteous throughout the proceedings and the court appreciates and thanks you for that."<sup>9</sup> Meng apparently responded in English with "Thank you, my lady."<sup>10</sup>

Meng then read out a statement outside the courthouse, thanking Holmes A.C.J., by name, for her "fairness in the whole legal proceedings", stating, "I also appreciate the Crown for their professionalism and the Canadian government for upholding the rule of law" and adding, "I'm also grateful to the Canadian people and media friends for your tolerance. Sorry for the inconvenience caused." She noted her life had been "turned upside down" and it had been a "disruptive time" for her as a "mother, wife and company executive", but it had been an "invaluable experience". She also, of course, noted her pride in her "dedicated lawyers".<sup>11</sup>

We do not suggest our positive views of the Canadian legal system depend on the views of a relieved participant about to disconnect from it. However, Meng's statement was not necessary for her to make (certainly her freedom did not depend on it), and it may at least carry some confirmatory weight—in Canada, the rule of law was evident and prevailed. (Certainly it is possible that Meng's views would not have been the same if extradition had proceeded without the deferred prosecution agreement having been entered into.)

The Canadian Department of Justice issued a statement as well (in its case a more predictable one), noting that "Canada is a rule of law country. Meng Wanzhou was afforded a fair process before the courts in accordance with Canadian law. This speaks to the independence of Canada's judicial system."<sup>12</sup> U.S. Acting Assistant Attorney General Mark J. Lesko said, in

turn, that “[w]e are enormously grateful to Canada’s Department of Justice for its dedicated work on this extradition and for its steadfast adherence to the rule of law”.<sup>13</sup> Of course, China’s official tone was not as complimentary, at least about the U.S. charges against Meng and her arrest in Canada; its official statement of September 25, 2021 did not bother to comment on the court process, presumably not used to seeing it as divorced from other state means of exercising power.<sup>14</sup>

The rule of law that benefitted Meng in Canada is not a principle that existed in China to the benefit of the “two Michaels”. Nor, sadly, did they benefit from the fact that Canada observed the rule of law with respect to Meng domestically—in late September 2021, soon after the return of Meng and the “two Michaels” to their respective home countries, Canadian Foreign Affairs Minister Marc Garneau noted in a speech to the United Nations General Assembly that “Canada observed the rule of law, and two Canadian citizens paid a heavy price for this commitment.”<sup>15</sup>

In this regard, on December 10, 2018—promptly after China protested Meng’s “unreasonable, unconscionable and vile” arrest and threatened consequences—Kovrig and Spavor were arrested in China, supposedly for endangering its national security.<sup>16</sup> On January 14, 2019, a Chinese court imposed a death sentence on Canadian Robert Schellenberg (previously sentenced to 15 years) in a drug smuggling case. China subsequently took various trade measures against Canada. Less than a month after Holmes A.C.J. dismissed Meng’s request to discharge her on the double criminality ground, on June 19, 2020, China charged Kovrig and Spavor on suspicion of spying. They were jailed throughout, in harsh conditions and with very limited consular access. Their trials began in March 2021, with Canadian diplomats refused access supposedly because of national security concerns. In August, a Chinese court rejected Schellenberg’s appeal from his death sentence, and Spavor was found guilty of espionage and sentenced to 11 years in prison. No decision was issued in the Kovrig case.

Despite the supposedly serious charges against them and Spavor’s conviction, Kovrig and Spavor were released and returned to Canada as Meng returned to China. Their respective airplanes reportedly took off from the two countries at roughly the same time.

The White House denied it had been involved in negotiating a “prisoner swap” (though President Biden had apparently pressed his Chinese counterpart recently to release Kovrig and Spavor). White House spokesperson Jen Psaki said the deferred prosecution agreement with Meng was “an action by the Department of Justice, which is an independent Department of Justice. This is a law enforcement matter” and “[t]here is no link”.<sup>17</sup>

Even if there was no formal deal, and though China attributed the Michaels' release to "medical" grounds, clearly the timing was not a coincidence. There is understandable speculation that China made sure to release them promptly in order to cement the impression that the cases were tied, and that if another country were to arrest a prominent Chinese national in the future, hostage diplomacy (though not a term China would adopt) rather than legal process will prevail.<sup>18</sup> However, at least within Canada, legal process did prevail, even if not reaching the point of Holmes A.C.J. issuing substantive reasons on the extradition request.

The strength of (and threats to) the rule of law in Canada are important for us to be alert to and consider. B.C. lawyers promise and swear, or affirm, to uphold the rule of law. Usually without a second thought we do exactly that as we advise clients, draft contracts and appear before courts and other tribunals. We are in a profession that presumes, both as a worthwhile theoretical construct and as a practical reality (otherwise there would be little point in retaining us), the importance of law in establishing process and achieving outcomes.

Where players who seem to reject the application of law achieve an outcome that is contrary to law, there is profound reason for concern about erosion of the rule of law in our society. However, within Canada an outcome consistent with law, pursuant to our process and under the Extradition Treaty (which was necessarily dependent on the unfolding of events in the United States), was achieved.

And indeed, it cannot be said that Meng herself, based at least on what is known to us, rejected the rule of law; rather, as noted above, the court recognized her engagement as cooperative and courteous. Further, the rejection by *China* of the validity of Canadian obligations under the Extradition Treaty and perhaps attendant Canadian process is not in itself a mark of Canadian failure. At least theoretically, both Canadian law and the treaties that Canada enters into should express values that are broadly shared among Canadians, not necessarily with foreign states other than, in the case of a treaty, a treaty partner. Of course, the countries that enter into an extradition treaty may try to find common ground between values captured in their respective domestic laws (e.g., in the form of "double criminality"), but—although this is in no way to excuse its conduct toward the "two Michaels"—the Extradition Treaty was not with China.

Even if our rule-of-law reputation and reality may have survived the Meng saga, however, there are other threats to the rule of law in Canada, or at least reasons for vigilance.

As noted above, at least theoretically, Canadian law is an expression of shared domestic values.<sup>19</sup> It should, by extension, constrain the few



tempted to act on values that diverge. Law may deter such conduct or authorize courts or police to stop such conduct when it occurs.

To a significant extent, law depends on there being sufficient willingness on the part of most people to comply absent the need for specific court or police intervention. Otherwise resources would be too overwhelmed for enforcement to occur. Those to whom law is applied need generally to believe in the substantive values it expresses, or at least to believe in the value of a system in which the law in force at any given time must be complied with unless or until it is amended. One might, in turn, surmise that the more people are seen as getting away with non-compliance, the more people will try it—perhaps a sign that the substantive values reflected in the law are outmoded, or at least a belief that is the case, but perhaps instead reflecting the opportunism of those who make no claim to have a better substantive alternative to the law already in place.

This is not the first time we have expressed those concerns, of course, nor are they especially profound. They are, however, increasingly acute—examples of unabashed and literally unmasked fellow citizens proudly telling reporters and each other of actions that are in breach of law, and conveying a sense of entitlement to act in breach (rather than the self-reflection and regret that might accompany an act of traditional civil disobedience), seem to proliferate. Within the United States, the sense of entitlement seen among those who roamed on camera through Capitol offices and attacked police officers on January 6, 2021 was a terrible example of a veering away from the social cohesion that needs to exist to some extent for the rule of law to be maintained.

Just as we said in our March 2019 *Entre Nous*, though there in the context of discussions regarding Meng's potential extradition, "as lawyers we ought to be wading into every single conversation about these issues and reminding people that Canada is a rule-of-law country. Our laws are known and accessible. They apply equally to all."<sup>20</sup> If we do not like those laws, we should try to change them, not suggest we are being dealt with unfairly if expected to abide by them until they are changed.

#### ENDNOTES

1. (2019) 77 Advocate 169.
2. The term "tit for tat" that we criticized—though not without detractors: see e.g. John Edmond, "Grumble" (2019) 77 Advocate 619—continues to be used in relation to the Meng case: see e.g. Chris Buckley & Katie Benner, "To Get Back Arrested Executive, China Uses a Hardball Tactic: Seizing Foreigners", *The New York Times* (25 September 2021), online: <[www.nytimes.com/2021/09/25/world/asia/meng-wanzhou-china.html](http://www.nytimes.com/2021/09/25/world/asia/meng-wanzhou-china.html)> (noting that "[t]he speed at which Beijing returned two Canadians held seemingly tit-for-tat in exchange may signal comfort with the tactic").
3. Prime Minister Trudeau claimed on December 6, 2018: "I can assure everyone we are a country of an independent judiciary and the appropriate authorities took the decisions in this case without any political involvement or interference". A useful chronology containing this and other items related to the Meng case is found in Richie Assaly, "A Timeline of the

- Meng Wanzhou Trial and Mounting Tensions between Canada and China", *Toronto Star* (24 September 2021), online: <www.thestar.com/news/canada/2021/09/24/a-timeline-of-the-meng-wanzhou-trial-and-mounting-tensions-between-canada-and-china.html>.
4. 2018 BCSC 2255. Meng was unsuccessful in applying for a variation in the terms of her judicial interim release (2021 BCSC 137).
  5. The Federal Court also became involved, in determining whether certain sensitive information could be disclosed (2020 FC 844).
  6. As quoted in Jason Proctor, "Crown Wraps Meng Wanzhou Extradition Case with Claim Charge Not 'Unique or Unprecedented'", *CBC* (12 August 2021), online: <www.cbc.ca/news/canada/british-columbia/meng-wanzhou-extradition-crown-final-1.6139195>.
  7. "B.C. Court Drops Extradition Case After Meng Wanzhou Enters Deferred Prosecution Agreement in U.S.", *Radio-Canada* (24 September 2021), online: <ici.radio-canada.ca/rci/en/news/1826820/b-c-court-drops-extradition-case-after-meng-wanzhou-enters-deferred-prosecution-agreement-in-u-s>.
  8. Statement from the Department of Justice Canada, "Extradition in Canada" (24 September 2021), online: <www.canada.ca/en/department-justice/news/2021/09/statement-from-the-department-of-justice-canada.html>.
  9. "B.C. Court Drops Extradition Case After Meng Wanzhou Enters Deferred Prosecution Agreement in U.S.", *supra* note 7.
  10. Joan Bryden et al, "Kovrig and Spavor on Way Back to Canada After Nearly Three Years Detention in China", *The Canadian Press* (24 September 2021, updated 25 September 2021), online: <www.cp24.com/mobile/news/kovrig-and-spavor-on-way-back-to-canada-after-nearly-three-years-detention-in-china-1.5599256>; Rob Gilroy, "Evening Update: Canada Drops Extradition Case Against Meng Wanzhou After Her Deal with U.S. Prosecutors; Fate of the Two Michaels Remains Unknown", *The Globe and Mail* (24 September 2021), online: <www.theglobeandmail.com/canada/article-evening-update-canada-drops-extradition-case-against-meng-wanzhou/>.
  11. "Meng Wanzhou Believed to Have Left Canada After B.C. Court Drops Extradition Case", *CBC News* (24 September 2021), online: <www.cbc.ca/news/politics/meng-wanzhou-us-court-1.6188093>.
  12. "Extradition in Canada", *supra* note 8.
  13. "Meng Wanzhou Believed to Have Left Canada", *supra* note 11.
  14. A spokesperson for China's Ministry of Foreign Affairs noted on September 25, 2021 that "[i]t has long been a fully proven fact that this is an incident of political persecution against a Chinese citizen, an act designed to hobble Chinese high-tech companies." She described "[t]he so-called 'fraud' charges against Ms. Meng Wanzhou" as "purely fabricated. Even HSBC, the so-called 'victim' portrayed by the US side, has disclosed materials that are sufficient to prove Ms. Meng's innocence." She concluded: "What the United States and Canada have done is a typical case of arbitrary detention": "Foreign Ministry Spokesperson Hua Chunying's Remarks on Meng Wanzhou's Return to China" (25 September 2021), online: <www.fmprc.gov.cn/mfa\_eng/xwfw\_665399/s2510\_665401/t1909814.shtml>. *The Economist* notes, more generally, under the heading "The rule of law with Chinese characteristics", that "[t]here are coherent arguments that China could make against Ms Meng's detention, drawing on its dislike of extraterritorial sanctions and prosecutions by America. Instead, in explaining her case, officials mostly present a cynical view of the law as a tool by which power is exercised": "When China Wants to Be Feared", *The Economist* (30 September 2021), online: <www.economist.com/china/2021/10/02/when-china-wants-to-be-feared>.
  15. Robert Fife, "Biden's Intervention Led to Freedom for Two Michaels, Sources Say", *The Globe and Mail* (27 September 2021; updated September 28, 2021), online: <www.theglobeandmail.com/politics/article-bidens-intervention-led-to-freedom-for-two-michaels-sources-say/>.
  16. Assaly, *supra* note 3.
  17. Alexandra Alper & Michael Martina, "White House Rebutts Idea That Huawei's Meng Was Freed in Prisoner Swap", *Reuters* (27 September 2021), online: <www.reuters.com/world/china/white-house-xi-raised-case-huawei-cfo-recent-call-with-biden-2021-09-27/>.
  18. As noted in *The Economist*, "China wants the world to know that it is willing to grab foreigners, if needs be": "When China Wants to Be Feared", *supra* note 14.
  19. Of course, the complexities underlying this simple statement should not be overlooked. Careful thought must go into law's content, including the scope of values that it should address (one view on this being Pierre Trudeau's "[t]here's no place for the state in the bedrooms of the nation"), how to determine whether a value is in fact broadly shared and whether laws that could harm a minority (rather than simply not being its preferred option) should automatically be off the table (as, in some cases, constitutional protections might achieve). Tragic mismatches can arise and no doubt have, including during the many years in which large parts of the population did not have access even to the ballot box as a means of conveying values important to them (even assuming the choice for whom to vote could have been a proxy for doing so). One might also ask in some cases whether laws should be enacted that get ahead of, and ultimately reshape, the majority view into one that legislators may believe is preferable.
  20. *Supra* note 1 at 173.



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# ON THE FRONT COVER

## CLARE JENNINGS

By Lorne Phipps



Clare's presence is usually announced by a gust of wind as she comes striding in from her most recent trial success or volunteer meeting. Her colleagues have become accustomed to her hurricane energy and the high standards she maintains as a trial lawyer, organizer, volunteer and teacher. Unfortunately, Clare's colleagues have also become accustomed to relying on her to pick up tasks like writing this article, so we do our best in her absence.

As this year's CBABC president, Clare has spoken of her goal to make the legal profession more inclusive and accessible. In sharing with you a bit about Clare, I think you will see how her life experiences have emphasized the importance of these values for her. I hope that in addition to giving you some insight into who Clare is, you also get a sense of who she will be as CBABC president.

### CLARE: THE BEGINNING

Like the great tapestry of the common law itself, Clare hails from many places. She was born in Smithers, but before she reached the age of ten her family moved successively to Burnaby, Terrace and Regina. When Clare was 11, her family moved to Ghana, living there for a year and a half. On returning from Ghana, Clare again lived in Terrace before moving, again, to Regina. She went to high school in Regina for the most part, splitting up her time there with a grade 11 exchange to Germany.

Clare found her time in Ghana to be formative. She went to Ghana International School, and her parents chose to locate in a Ghanaian neighbourhood, rather than an expat neighbourhood. She tells me that as an 11-year-old, this experience gave her an appreciation for difference. Because

of this experience, she has never assumed that people have lived similar lives or have similar expectations and values.

### CLARE: THE STUDENT

Clare went to university at McGill, completing an undergraduate degree in history and a master's degree in Canadian social and gender history. It was as a student at McGill that Clare met her husband, Alex. It was also during this period that they began pursuing their longstanding interest in theatre, forming a professional improv group called "Without Annette". They have continued this interest through to the present day, in a variety of volunteer and professional roles. In fact, Clare has written many of the scripts of Victoria Law Day's Fairy Tale Trial.

After finishing grad school, Clare worked as a financial aid advisor at McGill while deciding what to do next. She wanted to pursue a career-oriented program and decided she would either go to law school or complete a master's degree in library studies. She wrote the LSAT on a whim and did very well. Although she applied for both programs, she heard from law school first, sparing the world from its most intense and formidable librarian.

Having settled on law school, Clare decided to go to UVic. She was from the West Coast, among other places, and UVic had a reputation for being an intellectually engaging law school (being solidly ranked among the top three in British Columbia). Clare's husband left his Montreal home and followed her out to the coast. Apart from Clare's clerkship they have never left.

### CLARE: THE CLERK

After law school, Clare clerked for the Ontario Superior Court of Justice. She was the assigned clerk for all of the judges in the northern region of the province. Clare lived in Sudbury and spent a substantial amount of time in Thunder Bay and North Bay.

Clare loved her clerkship. She found that being with judges and counsel in the courtroom helped demystify the court experience. Observing the trial work of certain counsel helped assure Clare that meeting the bar for competent practice was much more achievable than she had thought.

### CLARE: THE CROWN

Following her clerkship, Clare articulated with the B.C. government's Legal Services Branch. When her articling term ended, she received a short-term

contract with the Victoria Crown office and was hired on full-time shortly after that. She has practised as Crown counsel ever since.

Clare has spent almost all her time in the Victoria Crown office on the trial team and has established herself as one of the leading trial lawyers in that office. She has prosecuted the full range of offences, including many serious allegations, including several murders: see e.g. *R. v. Barry*, *R. v. Ruffalo #2*, *R. v. Belcourt #2* and *R. v. Desroches*. Most recently, she co-prosecuted *R. v. Berry*, an exceptionally difficult and high-profile six-month murder trial.

Clare has been nominated for and received many awards for her work as Crown counsel, including the 2021 Region 1 Recognition Award. In addition to her work as a trial Crown, she is a frequent contributor in other ways: acting as temporary Administrative Crown Counsel, assisting with bail matters, completing serious and complex charge approvals, and taking the time to help colleagues with legal issues and strategy. Clare has been a principal to two articulated students and focuses significant time and energy on mentoring junior Crown counsel. She also bakes amazing cakes that must be seen to be believed.

Clare tells me that her time in the Victoria Crown office and her ascent as a trial lawyer has been assisted by many generous mentors. These include Kimberly Henders Miller, who was her supervisor during her articling rotation; Paula Donnachie; Carmen Rogers (now Rogers J. of the B.C. Provincial Court); Tamara Hodge; Patrick Weir; and John Labossiere. Speaking fondly of Patrick in particular, Clare told me, "That was more of a friendship thing. I don't think of Patrick as a mentor. Seriously, please don't put down Patrick as one of my mentors."

## CLARE: THE VOLUNTEER

Throughout the course of her legal career, Clare has been an active volunteer. Her many activities have included serving on the Victoria Law Day Committee for ten years, serving on the UVic Human Research Ethics Board, serving on the board of the Atomic Vaudeville Theatre Society, serving as a CBABC section chair and serving as a member of the CBA's Access to Justice and REAL advisory committees. In 2016, her many local contributions were recognized when she received the Victoria Bar Association's Volunteer Award.

One of Clare's most time-consuming and rewarding volunteer activities has been as coach of the UVic MacIntyre moot team. I was her co-coach there for many years, mainly playing the role of Ron MacLean to Clare's Don Cherry.

The MacIntyre is a trial moot and requires the participation of many volunteers who serve as witnesses during the team's practices over the course

of the year. Moot practice was always made exciting by fear of Clare's judgment, not only for the students, but for Clare's colleagues and friends who had unwittingly volunteered to play the roles of witnesses. One's professional competence could be called into question if one were seriously impeached by a second-year law student's cross-examination (so I hear!). Indeed, Clare's normally happy homelife was disrupted for a time when her husband Alex crumpled under one such student's questioning.

One of Clare's former moot students shared an anecdote about Clare that I think is quite telling. It was the eve of the big competition, and this student was feeling particularly nervous. She asked Clare if that feeling of nervousness on the eve of a big trial ever gets better. Clare replied by telling her that you should never stop getting nervous because those nerves mean you care and take your responsibility as an advocate seriously. Instead, you simply get better at managing the stress and anxiety. I think that response tells us something about who Clare is as an advocate.

#### **CLARE: THE CBABC MEMBER**

Clare became involved in the activities of CBABC as an articling student. Carmen Rogers, who was then a senior Crown in the Victoria office (now a judge of the B.C. Provincial Court), informed Clare that she would be "volunteering" for the Law Day Committee. Two or three years later, Clare was poised to become chair of the Law Day Committee, but the role required her to be a paid member of CBABC, so she joined. Having joined the CBA, Clare also signed up for the Victoria Criminal Justice Section, where she also quickly rose to be the co-chair. From there she started serving on several CBABC committees and, after being seduced with a combination of baubles and flattery from Victoria Crown colleagues Paul Pearson and Kimberly Henders Miller, she ran for, and was elected to, the board of directors in 2018.

As a member of the CBABC board, Clare has sat on and chaired a number of committees, and can be seen as the host of the CBA's video on gender pronouns. Her move up the executive ladder to her current role began with her election as second vice-president in 2019.

#### **CLARE: CBABC PRESIDENT**

As CBABC president, Clare wants to make sure the organization is at the forefront of navigating the many changes that are affecting the profession. This includes being a leading voice in the ongoing changes brought about by the COVID-19 pandemic, many of which will likely be permanent.



She also calls for improving interactions between lawyers, and between lawyers and clients. This includes continuing to work on the legal profession's use of gender pronouns, Indigenous reconciliation, and broader awareness of issues of race and culture. She believes that CBABC plays an important role as the voice of its members on these vital issues, and in moving our profession and our justice system toward greater diversity and inclusivity.

Clare points out that CBABC is already leading much of this work. CBABC's Sexual Orientation and Gender Identity Community Section was involved in prompting the courts' new policy on gender pronouns. CBABC has a Reconciliation Action Plan and offers a Reconciliation Response Plan guide for firms on how to incorporate principles of reconciliation into their business. CBABC's Indigenous Justice Action Committee and Equality and Diversity Committee are working on several new initiatives. CBABC also recently started a Restorative Justice Working group. In addition to the good work that has been done so far, Clare points to these initiatives as reflective of the CBABC's ongoing interest in hearing from members about what issues the organization should take on and how to approach them.

Clare's interest in promoting the CBABC's accessibility is not limited to diversity and inclusion initiatives. Rather, it is part of her broader goal to strengthen the connection that members feel to the organization. This could be in the form of a member's personal involvement, or a feeling of being represented by the organization's advocacy.

## CONCLUSIONS

Clare has been a great asset for every organization she has ever been a part of, and CBABC is no exception. We are very fortunate. And we are all the more fortunate because there was nothing inevitable about her journey. We could very easily have lost Clare along the way: to Ghana, or Germany, or the halls of academia, or a library basement—even (the mind revolts at the thought) Sudbury. She might have been an actor or a teacher or a baker or even one of those Legal Services Branch lawyers who go home at 4:15 every afternoon.

But luckily for us all, this quintessential Renaissance woman has navigated all the dangers, toils and snares, and has arrived where she belongs: in the presidency of the CBABC. Congratulations, Clare, and best wishes for the term ahead. We have no doubt that your energy will carry us all forward.

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# PROPOSED BEST PRACTICES IN THE PREPARATION OF APPLICATION RECORDS FOR A SUMMARY TRIAL IN THE SUPREME COURT OF BRITISH COLUMBIA

By the Honourable Justice Geoffrey Gomery\*

Summary trial applications require the Supreme Court to review a body of evidence and make findings of fact. A summary trial is a substitute for a trial in which evidence would be adduced through witnesses. In a summary trial, the primary mode of proof is documentary; while it is possible that witnesses will be called to supplement the documentary record, it is very much the exception rather than the rule.

This article focuses on summary trial applications, but much of it would apply to any application in which the court must review a body of evidence and come to conclusions concerning what can or cannot be proved. Examples include petition proceedings, certification applications, injunction applications, applications to approve a settlement and so on.

Summary trials have become an indispensable tool for the conduct of civil litigation in British Columbia, but they present challenges for the presiding judge, especially by comparison to an ordinary trial. Some challenges are inevitable, because it is in the nature of a summary trial that it is compressed, and the judge must absorb a volume of material more quickly than otherwise would be the case. However, additional challenges are imposed on the judge by litigation practices that are not well suited to the task at hand.

This article is intended to propose best practices to facilitate fact finding in summary trials. These are only the views of a single judge. The intended audience is litigation counsel. It must be borne in mind that it is counsel's responsibility to marshal and present evidence. The court's role is to receive

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\* I am grateful to Chief Justice Hinkson and Justices Horsman, Marzari and Skolrood, who took the time to review drafts of this article and offer comments. As stated in the body of the article, the views and proposals set out in the article are solely mine.

what counsel present and resolve disputes raised by objections from opposing counsel.

One of the difficulties with summary trials is that the evidence arrives before the court prepackaged and usually in final form. If the judge had a preference as to how it might most usefully be assembled, it is usually too late to express it. The difficulties raised by conventional practices therefore go undiscussed. Moreover, the topic is, frankly, boring. Many lawyers would tend to view the organization of application records as a job for their legal assistants. Lawyers focus on the drafting of affidavits, identification of relevant lines of authority and development of persuasive argument. They do not always consider what the judge will be able to make of the record when the case is taken under reserve. This article focuses attention on that question.

### FEATURES OF THE CONVENTIONAL TRIAL PROCESS

In a conventional trial, all of the evidence is admitted in the course of the trial, under the supervision of the judge. Much of the evidence is admitted through witnesses, and the taking of oral evidence usually occupies much of the trial. The trial judge manages the flow of the evidence as it is tendered, can reject evidence that is insufficiently probative and can deal with documentary materials that are obscure, illegible, confusingly formatted or assembled, and so on. The judge has an opportunity to seek clarification of documents whose meaning or significance is not clear on their face.

The trial is preceded by a trial management conference at which counsel are encouraged to consider and collaborate on the preparation of a common book of documents. In a common book, documents will be assembled in a discernable order, usually chronologically, and duplicate documents will largely be eliminated. A common book will be tendered at the beginning of the trial, and most trial judges will take the time to review it, in its entirety, in advance of the argument.

Argument occurs only after all the evidence has been admitted. By this point in the trial, the trial judge is already aware of the evidence and has a sense of the issues and the arguments the parties intend to advance. Most judges will have spent the trial actively thinking about the case. Many will have formulated questions to put to counsel during argument.

### FEATURES OF THE SUMMARY TRIAL PROCESS

Summary trials are almost always shorter than conventional trials. The judge probably receives an application record the afternoon before the summary trial begins. At a minimum, it contains a notice of application and application response (or responses), and affidavits prepared by counsel for all parties. It may also contain transcripts of evidence given on discovery,



transcripts of cross-examination on affidavits, notices to admit, written arguments (where the application is expected to take more than two hours), lists of authorities, a draft order and other materials included with the consent of all parties. On a summary trial application, the application record must also contain the pleadings, although they are sometimes overlooked in the preparation of the record.

Documentary exhibits are attached as exhibits to affidavits. Typically, they are scattered through the record. Transcripts are often attached to exhibits to affidavits sworn by legal assistants. Unless care has been taken in the preparation of the index to the application record, these materials are impossible to locate by using the index.

In a summary trial of consequence, the record will be voluminous and the judge will not have the time to review more than the notice of application and application responses before the hearing begins. The judge hears argument while attempting to understand the basic facts of the case.

## THE RULES GOVERNING THE PREPARATION OF APPLICATION RECORDS

The contents of an application record are governed by Rule 8-1(15) of the *Supreme Court Civil Rules*. Rule 8-1(15) requires that the record be submitted in a ringed, tabbed binder in the following order: a title page with the style of cause, an index, the filed notice of application, the filed application responses and “a copy of every filed affidavit and pleading, and of every other document other than a written argument, that is to be relied on at the hearing”.<sup>1</sup>

If the application is scheduled to require more than two hours, the application record may include written argument.<sup>2</sup>

Rule 8-1(15) does not require that the affidavits appear in any particular order. It does not foreclose the possibility that the exhibits to an affidavit might be separated from the body of an affidavit.

## WHAT THE JUDGE NEEDS IN A SUMMARY TRIAL

In a case of any consequence, counsel should assume that the judge will reserve judgment. The judge will take the application record, their notes of counsel's submissions and any written arguments tendered by the parties to their chambers to think about the case and prepare reasons for judgment.

The judge will need to assess the evidence, all of it, and not just the parts counsel have referred to in argument. Of course, counsel should have drawn the judge's attention to everything in the evidence that supports their arguments, but context matters, and sometimes counsel have chosen not to emphasize certain facts for tactical reasons.

One way for the judge to proceed is to start at volume 1 of the application record and proceed through to the end. This may not be the best way if the record does not present the evidence coherently. An alternative is to work from counsel's arguments, looking up the evidence touching on various submissions as the judge comes across them. This can be a tedious exercise, especially if counsel have neglected to cross-reference everything in their submissions to the evidence. It may verge on the impossible if the record is not properly indexed.

What the judge needs is to have the evidence organized in a way that facilitates understanding the facts and analysis of the factual issues. A logical organization would isolate witness statements in one part of the record and the documentary exhibits in another. It would usually help enormously if the documents were assembled chronologically.

To address factually contentious points, the judge needs to be able to cross-reference all of the evidence dealing with the point. Counsel may or may not have done this in their submissions; counsel often tend not to dwell on evidence they view as unhelpful, but it is the judge's job to consider all of it.

In short, the practices that facilitate judicial fact finding in a summary trial are those that enable the judge to take in and evaluate the evidence with a minimum of searching and cross-referencing.

## BEST PRACTICES IN THE PREPARATION OF APPLICATION RECORDS

1. Affidavits should be confined to facts bearing on the application before the court. The re-use of affidavits prepared for earlier applications should be avoided: they usually contain extraneous material, and often contain hearsay admissible in an interlocutory application but not on a summary trial.
2. Transcripts of discovery evidence included in a record should be limited to the portions of the transcript counsel are tendering in evidence. Opposing counsel must be given notice in advance of the passages to be tendered.<sup>3</sup> If opposing counsel take the position that additional passages must be referenced, on the principle of *Foote v. Royal Columbian Hospital*,<sup>4</sup> those passages should be included at the same place in the record so that the judge may have all of the evidence to be referred to in argument at one place in considering the request.
3. The index to an application record should identify the exhibits to each affidavit, so that it is possible to locate an exhibit in the index without knowing whose affidavit it is attached to.

4. Documentary exhibits should be duplicated only if absolutely necessary. If an affiant wishes to refer to an exhibit that has already been attached to an affidavit, the affiant should refer to the exhibit in that other affidavit.
5. Counsel should consider preparing a separate book of documentary exhibits containing all the documents attached as exhibits to affidavits, organized chronologically, with a table of concordance relating each document to the affidavit that exhibited it.
6. Counsel should consider grouping together all components of the record that contain the evidence of a single witness. For example, if the witness has sworn two affidavits and there is a transcript of an examination of the witness, all these materials should be found in successive tabs of the record.
7. If written argument is included in the record, it should be contained in a binder that is separate from the binder or binders containing the evidence, for ease of reference in checking the citations.
8. Counsel should consider using a compendium or condensed book for ease of reference during oral argument, bearing in mind that a condensed book containing decontextualized extracts from documents, transcripts or affidavits will not assist the judge in their review of the evidence as a whole.

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#### ENDNOTES

- |   |                              |
|---|------------------------------|
| 1. Subrule 8-1(15)(b)(v).               | 3. Rule 9-7(9).              |
| 2. Subrule 8-1(15)(c) and Rule 8-1(16). | 4. (1982), 38 BCLR 222 (SC). |



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# JUSTICE DELAYED? A QUANTITATIVE ASSESSMENT OF TRENDS IN LENGTH OF HEARING, LENGTH OF WRITTEN JUDGMENT AND TIME TO JUDGMENT – BRITISH COLUMBIA, 1970 TO 2015

By Mathew P. Good\*

**I**t is a commonly held view of lawyers, judges and justice commentators that Canada and British Columbia have an access to justice problem.<sup>1</sup> There has, however, been relatively little empirical research into whether this province's access to justice challenges are any more serious now than they were historically. To help inform the current discussion, this article attempts to collect and assess available data to address that question in the context of timeliness in the delivery of written judicial decisions, as one aspect of access to justice.<sup>2</sup> After a review of the data collected and its analysis, the latter sections of the article contemplate the significance and potential utility of the findings.

## OVERVIEW

There are no publicly available records or statistics that address the delay aspect of access to justice in relation to length of hearing, length of written judgment or time to issuance of written judgment in British Columbia's court system. To permit comparison on a historical scale, this article pulled together available data from written<sup>3</sup> judgments of the Supreme Court of British Columbia, the Court of Appeal for British Columbia and, as a kind of comparator, the Supreme Court of Canada, for the years 1970, 1980, 1990,

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2000, 2010 and 2015.<sup>4</sup> The project tracked four key metrics over time: length of hearing (expressed in number of days), time to judgment (number of days between the last hearing date and the issuance of reasons), length of written judgment (number of paragraphs) and number of written decisions from each court each year.

These metrics were chosen because they are what can be obtained consistently across time based on the limited information available. Data were collected from written judgments and then analyzed and compared. Several other metrics were added to try to provide additional bases for analysis and comparison: the subject matter of each decision (roughly categorized), whether it involved witnesses or not (trial vs. chambers hearings) and the number of decisions issued by a court in a given year, where this information was available. The data sets are imperfect and so are the results of this analysis, as described below. Nevertheless, this article describes the best available information.

In summary, hearings have gotten longer (although primarily at the trial level), judgments have gotten significantly longer and written judgments are taking longer to issue. The number of judgments has likewise increased, except at the Supreme Court of Canada, where it has fallen. These broader trends across all types of hearing and subject matter somewhat obscure the developments for specific areas of the law (especially family law) and types of hearing (especially chambers hearings).

Readers are cautioned that neither the study and nor this article was intended to be exhaustive. Instead, the object of the exercise was to provide a historical snapshot to assist policymakers and stakeholders in framing the dialogue around access to justice in British Columbia and Canada.

## IMPETUS

The starting point for this project was two-fold. First, comments from senior members of the bar about former days when the administration of justice was perceived to be speedier inspired the author to ask: Was that really the case? For their part, judges have complained that they are not being given enough time or resources in which to address the increasing complexity of cases.<sup>5</sup>

Second, and principally on the part of more junior members of the bar, there is a sense that there are more judgments being issued today and that they are longer. This becomes apparent in the process of researching almost any legal issue because electronic searches return overwhelming numbers of results. Upon inspection, most turn out to be of little assistance in any

given case, but the informational overload increases the time required for research (even for narrow questions), increases the associated cost and contributes to analytical exhaustion on the part of the reviewer. Perhaps paradoxically, this illusion of abundant and accessible jurisprudence also undermines the idea that the law is rational, coherent and capable of being known.<sup>6</sup> The more decisions there are, the greater the difficulty in reconciling them, for judge and practitioner, as well as the public, which is surely an access to justice issue in itself.

During the course of the project, the conundrum of access to justice has drawn increasing attention in the media and public discourse. Whether the perception of delay in the administration of justice is truly a new phenomenon is not answered by this article. The perception, however, that there is a problem of delay is borne out by anecdotal publicized incidents of delay in the Canadian justice system. Consider the more than 12-year delay in an Ontario family case<sup>7</sup> and the four-year delay in receiving reasons in *Swiss Reinsurance Company v. Camarin Limited* in this province.<sup>8</sup> Regardless of whether this is a new problem, a collection of aberrations or the same situation, these incidents negatively affect the public perception of the administration of justice and give rise to comments in the media and the profession about delay (the “justice delayed is justice denied” trope).

Why go to the effort of collecting historical data and consider these issues at all? Without a historical baseline, it is difficult to pinpoint changes or monitor developments. Knowing what is occurring provides an opportunity to identify trends and try to identify causes. Having at least a sense of the historical picture also permits responsive changes to be made and assessed.

## METHODOLOGY AND CAUTIONS

Data on the four principal metrics were collected using information available on LexisNexis Quicklaw, the Supreme Court Reports<sup>9</sup> and the B.C. courts’ website.<sup>10</sup> Judgments throughout the period 1970 to 2015 consistently recorded, on the face of the reasons, at least one or more of the date(s) of hearing, the date of judgment and the number of paragraphs.<sup>11</sup> Based on the available resources, the same alternating six months of data were compiled for each study year. This exercise had to be done manually because there was no existing dataset from which to work.<sup>12</sup> The collection and analysis process took far longer than originally anticipated and was constrained by available resources.

Classification of judgments by subject matter was more art than science. Any number of additional categories could have been defined, but it would have overwhelmed the project. Other data were obtained from the courts' annual reports and from mining other publicly available sources. Despite these efforts, there are still gaps in the available data, as described later in this section.

In an attempt to bring some measure of scrutiny and precision to the project, based on the data collected, averages for each metric were calculated, and all plots were corrected for variance to two standard deviations.<sup>13</sup> There remain unavoidable challenges with the data, however.

First, there are "invisible" numbers that cannot be captured by the extraction of data from the decisions, including decisions not selected for publication by the courts or legal publishers, oral judgments not transcribed, decisions (orders) without reasons, jury verdicts and matters with publication bans or otherwise sealed to the public.<sup>14</sup> In addition, not every data point is available for each period or court examined.

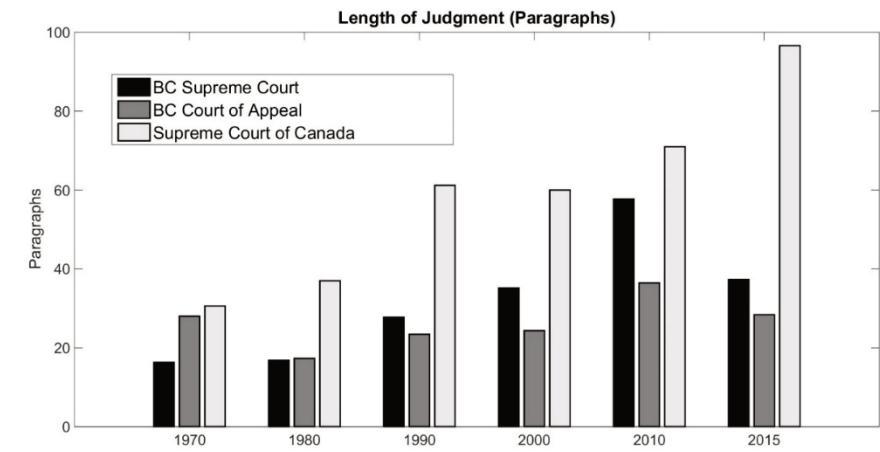
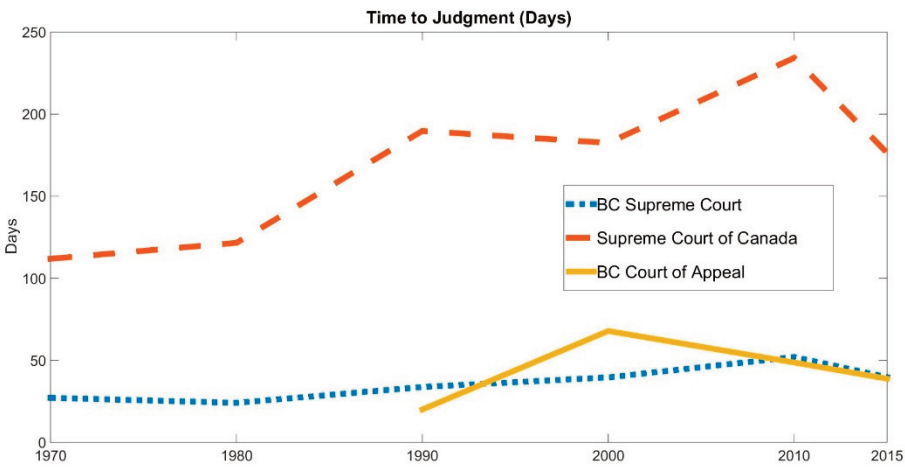
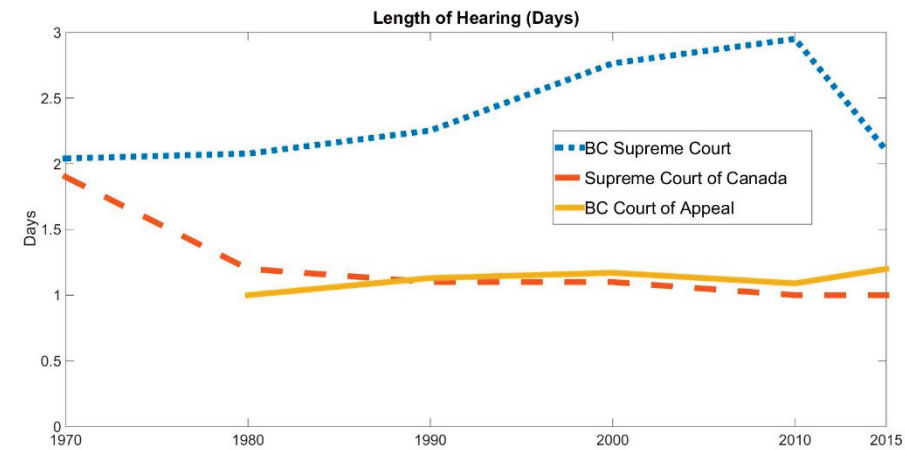
Second, the period 2010 to 2015 is only a five-year window, compared to ten years for the other periods, so trends may or may not have continued over the full decade to 2020.<sup>15</sup>

Third, an attempt was made to assess degrees of correlation relative to other variables such as the population of British Columbia (because changes in it are presumed to be unrelated to justice-specific trends), the number of practising lawyers and the number of sitting judges. Further correlations were attempted, including based on the relative number of years of experience of decision makers, the active judicial complement over time and the number of filings per court. Unfortunately, the data did not permit any meaningful analysis of correlation on any of these bases because of weaknesses inherent in the dataset or an absence of available data. From a statistical point of view, the datasets are considered small, and the subsets of data (by subject matter, for example) tend to break down into statistical irrelevance because they are so small. Accordingly, this article is mostly confined to the most basic of statistical analysis and conclusions.

## FINDINGS

Briefly, each of the key metrics showed a general increase over the study period, but the reality is nuanced, as detailed below. The following charts show the change in the variables of length of hearing, length of judgment and time to judgment for B.C. courts and the Supreme Court of Canada over the period 1970 to 2015:<sup>16</sup>





As the visual presentation should make clear, the greatest change has come in the length of reasons, but hearings and the time needed to issue decisions have also gone up. To better understand and assess the import of the findings, as well as their limitations, it is helpful to look at each of the courts separately and break the numbers down further.

**British Columbia Supreme Court**

By reason of its role as the court of first instance, the trial court necessarily generated more decisions than the appellate courts. Over the study period, the length of hearing increased, as did the time between hearing and the issuance of reasons. The B.C. Supreme Court also produced more decisions each year.

Looking first at the figures for each metric:

B.C. Supreme Court Data by Year				
Year <sup>17</sup>	Average length of hearing (days) <sup>18</sup>	Average time between hearing and judgment <sup>19</sup> (days) <sup>20</sup>	Average length of judgment (paragraphs)	Number of decisions <sup>21</sup>
1970	2.4	31.7	15.4	459 <sup>22</sup>
1980	2.4	28.5	18.5	1,640
1990	2.6	31.1	40.2	1,783
2000	3.2	45.5	38.6	1,924
2010	3.4	59.1	63.2	1,965
2015	3.6	59.0	76.1	2,230 <sup>23</sup>

To understand the degree of change, it is instructive to consider the change between the first year of the study (1970) and the last year (2015):

B.C. Supreme Court Comparison 1970 to 2015								
Years	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change	Number of decisions	% change
1970 to 2015	2.4→3.6	+50%	31.7→59.0	+86%	15.4→76.1	+394%	1,650 <sup>24</sup> →2,230	+135%

As indicated above, the greater degree of change came in the length of judgments and the number of decisions from the court (by almost 400 per cent), but the length of hearings also increased by fifty per cent and the time between hearing and judgment by almost ninety per cent.

Next, consider the changes in the same metrics between chambers matters and trial judgments (distinguished not based on interlocutory versus final adjudication, but on whether witnesses are heard):

<b>B.C. Supreme Court Data by Year – Trial vs. Chambers (Disaggregated)</b>				
<b>Year</b>	<b>Trial or Chambers<sup>25</sup></b>	<b>Average length of hearing (days)</b>	<b>Average time between hearing and judgment (days)</b>	<b>Average length of judgment (paragraphs)</b>
<b>1970</b>	Trial	3.1	45.3	19.1
	Chambers	1.4	12.6	10.9
<b>1980</b>	Trial	3.4	36.0	23.1
	Chambers	1.4	20.1	13.5
<b>1990</b>	Trial	4.0	54.4	43.1
	Chambers	1.5	29.0	21.6
<b>2000</b>	Trial	5.6	60.7	54.0
	Chambers	1.9	38.3	31.3
<b>2010</b>	Trial	6.4	98.4	77.7
	Chambers	1.7	44.8	49.2
<b>2015</b>	Trial	7.3	81.0	127.8
	Chambers	1.9	49.6	54.1

The length of hearings obviously increased decade by decade, regardless of whether the hearing was a chambers matter or a full trial. Expressed as the change between 1970 and 2015, the changes are stark:

<b>B.C. Supreme Court Comparison of Trial vs. Chambers</b>						
<b>Type of hearing</b>	<b>Average length of hearing (days)</b>	<b>% change</b>	<b>Average time between hearing and judgment (days)</b>	<b>% change</b>	<b>Average length of judgment (paragraphs)</b>	<b>% change</b>
Trial	3.1→7.3	<b>+135%</b>	45.3→81.0	<b>+78%</b>	19.1→127.8	<b>+569%</b>
Chambers	1.4→1.9	<b>+35%</b>	12.6→49.6	<b>+293%</b>	10.9→54.1	<b>+396%</b>

There is a degree of variation between the changes for chambers matters and those for trial matters: chambers matters were only about one third longer, but the length of time it took for reasons to be issued almost tripled. In contrast, the length of trials went up by one hundred and thirty-five per cent, but the time it took for judgments to be issued increased by a smaller margin. For both chambers and trial decisions, judgments got considerably longer.

Next, consider the data classified by subject matter of the underlying proceeding, using the general subject matter categories of criminal, family, general civil and administrative law:

<b>B.C. Supreme Court</b> <b>Data by Year – Subject Matter (Disaggregated)</b>				
Year	Type	Average length of hearing (days)	Average time between hearing and judgment (days)	Average length of judgment (paragraphs)
<b>1970</b>	Criminal	2.8	13.2	21.0
	Family	1.4	55.1	14.0
	General Civil	2.6	27.6	18.5
	Administrative	1.7	12.7	10.3
<b>1980</b>	Criminal	1.3	16.0	14.7
	Family	1.9	26.9	17.5
	General Civil	2.7	30.0	19.4
	Administrative	2.1	21.5	23.0
<b>1990</b>	Criminal	2.4	33.4	24.0
	Family	2.6	45.4	31.4
	General Civil	2.7	40.0	31.9
	Administrative	1.6	44.4	33.8
<b>2000</b>	Criminal	4.5	22.2	42.2
	Family	3.1	43.1	37.7
	General Civil	3.0	50.9	37.7
	Administrative	2.3	51.6	46.2
<b>2010</b>	Criminal	3.4	23.2	52.2
	Family	3.5	69.0	65.4
	General Civil	3.5	64.3	65.6
	Administrative	2.0	67.3	59.4
<b>2015</b>	Criminal	4.2	30.4	67.8
	Family	3.8	65.6	84.9
	General Civil	3.4	64.0	75.7
	Administrative	2.7	78.1	72.4



Again, expressed as the change between 1970 and 2015, the changes are evident:

<b>B.C. Supreme Court Comparison by Subject Matter</b>						
Type of hearing	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change
Criminal	2.8→4.2	<b>+50%</b>	13.2→30.4	<b>+130%</b>	21.0→67.8	<b>+222%</b>
Family	1.4→3.8	<b>+171%</b>	55.1→65.6	<b>+19%</b>	14.0→84.9	<b>+506%</b>
General Civil	2.6→3.4	<b>+30%</b>	27.6→64.0	<b>+131%</b>	18.5→75.7	<b>+309%</b>
Administrative	1.7→2.1	<b>+23%</b>	12.7→78.1	<b>+514%</b>	10.3→72.4	<b>+602%</b>

All types of dispute showed more time involved. Looking closer, the length of hearing did not increase as much relatively as length of judgment and time to judgment over the period,<sup>26</sup> except for family law matters.

Without simply repeating the numbers from the tables above, the general trend for the B.C. Supreme Court over the period 1970 to 2015 is one of increasing timelines for length of hearing, time between hearing and judgment, length of judgment and number of judgments issued by the court each year.

### British Columbia Court of Appeal

The data collected from the B.C. Court of Appeal shows similar changes over the study period. There were some greater challenges with the data, including that the judgments from the 1970s and 1980s did not necessarily include hearing date on the face of the reasons. First, consider the basic data points:

<b>B.C. Court of Appeal Data by Year</b>				
Year	Average length of hearing (days)	Average time between hearing and judgment (days)	Average length of judgment (paragraphs)	Number of decisions <sup>27</sup>
<b>1970</b>	NI <sup>28</sup>	NI	28.0	105 <sup>29</sup>
<b>1980</b>	1.0	NI	17.4	699
<b>1990</b>	1.1	20.1	23.4	768
<b>2000</b>	1.2	67.9	24.4	687
<b>2010</b>	1.1	48.7	36.5	588
<b>2015</b>	1.2	38.8	39.0	553 <sup>30</sup>

Comparing 1970 (or the nearest available year for which data was available) to 2015, an overall increase in all metrics is apparent:

<b>B.C. Court of Appeal</b> <b>Comparison 1970 to 2015</b>								
Years	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change	Number of decisions	% change
<b>1970 to 2015</b>	1.0 <sup>31</sup> →1.2	<b>+20%</b>	20.1 <sup>32</sup> →38.8	<b>+93%</b>	28.0→39.0	<b>+39%</b>	699→553	<b>-21%</b>

The overall change in length of hearing and length of judgment was much less pronounced for the Court of Appeal than for the trial court. The rate of increase in the average time to judgment was roughly the same in the two courts. The apparent decrease in the number of decisions (1980 to 2015) stands out.

Turning next to the assessment of full appeal decisions versus chambers hearings:

<b>B.C. Court of Appeal</b> <b>Data by Year – Trial vs. Chambers (Disaggregated)</b>				
Year	Appeal or Chambers	Average length of hearing (days)	Average time between hearing and judgment (days) <sup>33</sup>	Average length of judgment (paragraphs)
<b>1970</b>	Appeal	NI	NI	28.9
	Chambers	NI	NI	12
<b>1980</b>	Appeal	NI	NI	21.3
	Chambers	NI	NI	9.5
<b>1990</b>	Appeal	1.2	22.5	25.1
	Chambers	1	3.7	11.8
<b>2000</b>	Appeal	1.2	81.3	28.1
	Chambers	1.0	16.1	12.0
<b>2010</b>	Appeal	1.1	55.6	41.9
	Chambers	1.0	21.4	17.1
<b>2015</b>	Appeal	1.1	57.8	41.1
	Chambers	1.0	26.3	28.7

The changes are not necessarily evident simply by looking at the data, so consider the comparison below:

<b>B.C. Court of Appeal</b> <b>Comparison of Appeals vs. Chambers</b>						
Type of hearing	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change
Appeal	1.2→1.2	NC <sup>34</sup>	22.5→57.8	+159%	28.0→41.1	+47%
Chambers	1.0→1.0	NC	3.7→26.3	+611%	12.0→28.7	+139%

Viewed this way, the changes are dramatic: no change in the length of hearings for either chambers or appeals, but a massive increase in the length of time to issue chambers decisions (and a more limited though still notable increase for appeal decisions). Chambers decisions also got longer by a larger margin than did appeal judgments.

Looking at the B.C. Court of Appeal data by subject matter:

<b>B.C. Court of Appeal</b> <b>Data by Year – Subject Matter (Disaggregated)</b>				
Year	Type	Average length of hearing (days)	Average time between hearing and judgment (days)	Average length of judgment (paragraphs)
<b>1970</b>	Criminal	NI	NI	25.9
	Family	NI	NI	28.6
	General Civil	NI	NI	30.0
	Administrative	NI	NI	—
<b>1980</b>	Criminal	NI	NI	15.3
	Family	NI	NI	19.8
	General Civil	NI	NI	19.8
	Administrative	NI	NI	3.0
<b>1990</b>	Criminal	1	12.4	20.6
	Family	1	5.0	18.3
	General Civil	1.2	27.4	25.7
	Administrative	1.0	40.8	37.5

B.C. Court of Appeal—continued Data by Year – Subject Matter (Disaggregated)				
Year	Type	Average length of hearing (days)	Average time between hearing and judgment (days)	Average length of judgment (paragraphs)
<b>2000</b>	Criminal	1.1	71.4	20.4
	Family	1.1	70.2	26.0
	General Civil	1.2	65.6	27.0
	Administrative	1.0	97.5	20.8
<b>2010</b>	Criminal	1.1	44.2	34.8
	Family	1.1	56.4	45.2
	General Civil	1.1	50.1	35.8
	Administrative	—	—	—
<b>2015</b>	Criminal	1.0	52.3	33.0
	Family	1.0	47.1	36.8
	General Civil	1.2	54.9	44.6
	Administrative	1.1	65.0	47.4

Again, a simple glance at the data does not convey the nature of the changes over time, so a comparison from 1970 to 2015 is illustrative:

B.C. Court of Appeal Comparison by Subject Matter						
Type of hearing	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change
Criminal	1.0 <sup>35</sup> →1.0	NC	12.4 <sup>36</sup> →52.3	+321%	25.9→33.0	+27%
Family	1.0→1.0	NC	5.0→47.1	+842%	28.6→36.8	+29%
General Civil	1.2→1.2	NC	27.4→54.9	+100%	30.0→44.6	+47%
Administrative	1.0→1.1	+10%	40.8→65.0	+59%	25.7 <sup>37</sup> →47.4	+84%

Presented in this way, the types of developments and the nuances are apparent: no change in the length of hearing, except for administrative law matters; modest increases in the length of decisions of all types; and arresting increases in the time between hearing and judgment (but above all for family matters).



In sum, apart from length of hearings, all metrics increased significantly between 1970 and 2015 at the B.C. Court of Appeal.

### Supreme Court of Canada

As a way of viewing the performance of the B.C. courts in a comparative light, the same data points were collected from the Supreme Court of Canada. Although that court has a much smaller and more specialized workload than either the B.C. Supreme Court or the Court of Appeal, and controls most of its own docket through the leave process, it is still instructive to consider its performance.

Looking first at the figures for each year:

Supreme Court of Canada <sup>38</sup> Data by Year				
Year	Average length of hearing (days)	Average time between hearing and judgment (days) <sup>39</sup>	Average length of judgment (paragraphs)	Number of decisions
1970	1.9	111.9	30.6	86
1980 <sup>40</sup>	1.2	121.6	37.0	159
1990	1.1	189.8	61.2	140
2000	1.1	182.5	60.0	69
2010	1.0	234.3	71.0	67
2015	1.0	176.4	96.6	65

Comparing the high court's performance in 1970 versus 2015 shows a marked reduction in the length of hearings and the number of decisions issued, but a significant increase in the time to judgment and the length of the reasons:

Supreme Court of Canada Comparison 1970 to 2015								
Years	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change	Number of decisions	% change
1970 to 2015	1.9 <sup>1</sup> →1.2	-47%	111.9→176.4	+57%	30.6→96.6	+222%	86→65	-24%

(There are too few decisions in any given subject area per year, and most interlocutory decisions are not published, so there is no data or analysis of these other aspects of the Supreme Court of Canada's practice.)

To compare the three courts together, it is necessary to restate the four metrics in the same table:

All Courts Comparison 1970 to 2015								
Court	Average length of hearing (days)	% change	Average time between hearing and judgment (days)	% change	Average length of judgment (paragraphs)	% change	Number of decisions	% change
BCSC	2.4→3.6	+50%	31.7→59.0	+86%	15.4→76.1	+394%	1,650→2,230	+135%
BCCA	1.0→1.2	+20%	20.1→38.8	+93%	28.0→39.0	+39%	699→553	-21%
SCC	1.9→1.0	-47%	111.9→176.4	+57%	30.6→96.6	+222%	86→65	-24%

Of the three courts considered, only the Supreme Court of Canada showed a measurable decrease in length of hearing over the study period. For that court, the already prolonged time to judgment increased by a lesser margin. The average length of decisions increased for all courts but was most modest for the Court of Appeal. Only the trial court showed a significant increase in the number of decisions.

## COMPARISON TO OBJECTIVE BENCHMARKS

In considering these statistics, it is helpful to review them against objective benchmarks for performance. Here, in the absence of existing studies on these aspects of the administration of justice, it is worthwhile to consider the results of the study against targets identified for best practices.

The Canadian Judicial Council's *Ethical Principles for Judges* provides the most well-established target for the timing of delivery of reasons for judgment:

The proper preparation of judgments is frequently difficult and time consuming. However, the decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner. In 1985, the Canadian Judicial Council resolved that, in its view, reserved judgments should be delivered within six months after hearings, except in special circumstances.<sup>41</sup>

In Ontario and Prince Edward Island,<sup>42</sup> there are also legislated targets, which permit a senior judge to relieve a judge of their other duties if a decision has not been rendered in a matter within six months.

The courts of British Columbia have long sought to meet the six-month target for issuing reasons. See, for example, the comments in the 1998 B.C. Supreme Court *Annual Report*:

The Canadian Judicial Council has suggested that every effort be made to ensure delivery of Reasons for Judgment within six months of the trial completion. In most instances, members of the Court have issued Reasons on cases within our targeted date of five months from the completion of the trial. *It is [the] hope [of the Court] that, by the end of 1999, with the possible exception of lengthy, complicated matters, all Reasons for Judgment will be issued within the maximum six month period.*<sup>43</sup>

An analysis of the available data confirms that the courts of British Columbia have generally been successful in meeting the six-month target over the period 1970 to 2015. With reference to the B.C. Supreme Court's trial decisions, a minority (albeit an increasing minority) fall beyond the six-month target:

Year	Total number of trial decisions <sup>44</sup>	Number of trial decisions that took longer than 183 days (six months) to issue	% of trial decisions that took longer than 183 days (six months) to issue
1970	120	3	2.5%
1980	295	6	2.0%
1990	388	25	6%
2000	309	28	9%
2010	334	34	10%
2015	310	45	14.5%

The Court of Appeal has been similarly successful for appeal decisions:

Year	Total number of appeals <sup>45</sup>	Number of appeal decisions that took longer than 183 days (six months) to issue	% of appeal decisions that took longer than 183 days (six months) to issue
1970	NI	NI	—
1980	NI	NI	—
1990	52	0	0%
2000	276	13	5%
2010	222	12	5%
2015	204	3	1%

By contrast, the Supreme Court of Canada has been notably unsuccessful in achieving the six-month best practice:<sup>46</sup>

Year	Total number of decisions	Number of decisions that took longer than 183 days (six months) to issue	%
1970	86	14	16%
1980	159	29	18%
1990	140	63	45%
2000	69	The average length of time between hearing and judgment for <i>all</i> decisions was 182.5 days	This suggests that a substantial percentage of decisions were issued beyond six months, but the aggregation of the data in the primary source does not make it possible to obtain a specific number of decisions <sup>47</sup>
2010	67	234.3 <sup>48</sup>	<i>Ibid.</i>
2015	65	176.4 <sup>49</sup>	<i>Ibid.</i>

## SO WHAT?

At this stage in the inquiry, it is worth pausing to ask whether longer hearings, longer time to judgment, longer judgments and more of them are either good or bad. This is necessarily a determinative exercise, but one worth engaging in, at least cursorily. Consider: if the quality of justice or the outcomes (however measured) from lengthier hearings and judgments were somehow better, then the changes from 1970 to 2015 would not be considered negative. Conversely, if the only metric that matters is the speed of the administration of justice measured by the issuance of written reasons, then the changes above indicate a denial of timely adjudication—justice delayed.

It is likely that the truth lies somewhere in between. If hearings take longer because of extrinsic factors (beyond the control of the judge and counsel), but decisions are crafted with perhaps a greater degree of sensitivity than might have been the historical norm, then some additional delay may be regarded as a necessary trade-off. That laudable object does not mean justice system participants should not strive to do better or excuse slow performance. It may, however, offer an appropriately nuanced interpretation of the present reality.



Similarly, if judgments take longer to issue because the priority is to have a judge available for as many hearings as possible, thereby reducing time available for reserve judgment writing, then an increase in time to issue reasons may be reflective of a balancing of competing priorities within the judicial administration. The relative changes in available judicial person hours for in-court work versus judgment writing is not a metric that was collected or analyzed for this article but would be a worthy subject for future study. Consider: If a judge delays writing a decision in a matter on reserve in order to hear and give oral reasons on another matter, has there been a net delay in the administration of justice?

Although it is tempting to speculate about the possible causes of the trends identified in this article, it is beyond the scope of the present exercise. The hope is that the empirical data collected and presented through this article goes some way towards informing the conversation on access to justice going forward.

#### ENDNOTES

1. Consider, for example, public remarks by the past two Chief Justices of the Supreme Court of Canada (Chief Justice McLachlin, "The Legal Profession in the 21st Century" (14 August 2015); Chief Justice Wagner, "Access to Justice: A Societal Imperative" (4 October 2018)), as well as those by the Chief Justices of both the BC Court of Appeal (Chief Justice Bauman, "Access to Justice in Family Law" (12 September 2017); "Separate but Cohesive: Navigating the Separation of Powers in Promoting Access to Justice" (28 May 2017); "Why Access to Justice for Children Matters" (11 May 2017); "Pick up the Pace? What Judges Do in a Day" (18 December 2016)) and the BC Supreme Court (2019 *Annual Report* at 1), as well as by British Columbia's Attorney General David Eby ("Attorney General's Statement on Access to Justice Week" (30 September 2018)).
2. See Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick A Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 26–29 (including delay as an "objective" barrier to achieving access to justice).
3. The term "written" is employed deliberately, to capture the widest description of published, unpublished, reported and unreported judicial decisions. Before about 2000, there was a material distinction between published and unpublished decisions. Published judgments were the ones selected for publication by the commercial publishers such as the DLRs, BCLRs, WWRs, etc. Unpublished judgments were also reasoned judgments but were deemed not sufficiently important to publish by the commercial publishers, sometimes wrongly. Though it might be hard at times to locate unpublished judgments, they did circulate, and copies could be found at the courthouse library and registry. This article includes both published and unpublished judgments so long as they were eventually added into the LexisNexis database service (which includes cases without a traditional reporter citation as well as other written decisions) or issued with a neutral citation and made available by the BC courts. LexisNexis was chosen as the principal data source because it had the most available decisions in the most consistent format.
4. These years were chosen based on availability of data and apparent representativeness for an inquiry of the present scope.
5. See e.g. the comments in *Western Larch Limited v Di Poce Management Limited*, 2012 ONSC 7014 at paras 269–77.
6. Pace Ronald Dworkin and Duncan Kennedy.
7. Tracey Tyler, "Toronto Woman Waiting Since Last Century for Judge's Decision in Child Custody Case", *Toronto Star* (17 October 2011), online: <[www.thestar.com/news/crime/2011/10/17/toronto\\_woman\\_waiting\\_since\\_last\\_century\\_for\\_judges\\_decision\\_in\\_child\\_custody\\_case.html](http://www.thestar.com/news/crime/2011/10/17/toronto_woman_waiting_since_last_century_for_judges_decision_in_child_custody_case.html)>. The article also refers to delays in other matters of three years (a ruling on whether a judge had been misled about a journalist's role in an RCMP investigation), 29 months (a ruling on legal costs in child support cases) and 25 months (an acquittal on weapons offences).
8. 2012 BCSC 1006 (hearing concluded on July 17, 2008; reasons for judgment issued on July 9, 2012). See also the nearly two-year delay in *BNSF Railway Company v Teck Metals Ltd*, 2020 BCSC 1133.
9. Available online through the Lexum Supreme Court of Canada collection: <[scc-csc.lexum.com](http://scc-csc.lexum.com)>.
10. See <[www.courts.gov.bc.ca](http://www.courts.gov.bc.ca)>.
11. Where paragraphs were not indicated by number, they were manually counted. The data were not collected by reference to neutral citations because

- Quicklaw's database is more complete than the currently available public databases that use neutral citations. See Thom Neale, "Citation Analysis of Canadian Case Law" (2013) 1:1 *Journal of Open Access to Law* 1 at 25.
12. The underlying dataset is available from the author.
  13. For the less mathematically inclined, this means, for example, that decisions like *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185 (SC), which took 374 days of trial, were not permitted to distort the general averages.
  14. The author was unable to determine the ratio of unpublished to published reasons in British Columbia.
  15. In the interests of completing this project, a line had to be drawn somewhere, however arbitrary.
  16. These are corrected averages.
  17. Sample of six months of data per year. Includes decisions issued in that year, even if heard in a preceding year.
  18. One day or less recorded as "1". Obviously, there is a distinction between a five-minute matter and a full day matter, but the available data did not permit that kind of distinction.
  19. Includes date of judgment.
  20. Oral judgments recorded as "0". Accordingly, the statistic applies only to reserved decisions.
  21. Quicklaw (search by date range: January 1, [year] to December 31, [year]; search term: "[year] B.C.J."; court: BC superior courts (i.e., County and Supreme)).
  22. Some reviewers questioned whether the 1970 number is an undercount, given its significant difference even from 1980. The author was unable to locate an alternative cross-check on the number of reported decisions for that year (CanLII shows only 99 decisions and the B.C. Courts website shows none), so the later tables use 1980 for analysis of this metric, below.
  23. BC Supreme Court *Annual Reports* for 2011–2015.
  24. 1980 figure.
  25. Includes decisions on the merits brought by way of application (e.g., summary trial, summary judgment).
  26. The statistics are not able to reflect the length of a trial over calendar (real-world) time: as practitioners and judges well know, it is common for trials to be interrupted or split, especially between the end of evidence and final submissions. This additional delay does not present itself in any of the metrics addressed in this paper.
  27. Quicklaw (search by date range: January 1, [year] to December 31, [year]; search term: "[year] B.C.J."; court: BC Court of Appeal).
  28. "No Information".
  29. For the same reason as with the BC Supreme Court decisions, the tables below use 1980 for comparative purposes.
  30. 2015 Court of Appeal *Annual Report* at 38.
  31. 1980.
  32. 1990.
  33. The statistic applies only to reserved decisions.
  34. "No change".
  35. 1990.
  36. 1990.
  37. 1990.
  38. Data compiled from Supreme Court of Canada *Annual Reports* (2002–present) and Supreme Court of Canada Reports on Lexum. Includes both appeal judgments and applications (other than leave).
  39. Court statistics 1997–present provided by "month". Used 30.42 days as equivalent to convert to a "month". 1970–1990 calculated manually based on dates on face of SCRs.
  40. Six months of data only, owing to the 159 judgments issued that year and the need to manually count paragraphs.
  41. Canadian Judicial Council, *Ethical Principles for Judges* (2004), ch 4, at para 10, online: <cjc-ccm.ca/cmslib/general/news\_pub\_judicialconduct\_Principles\_en.pdf>. Legislation and rules of court may establish times within which judgment is to be given: see e.g. *Code of Civil Procedure*, CQLR c C-25.01, art 324; repeated inability to give timely judgment has been the basis of a number of complaints to the Canadian Judicial Council: see Canadian Judicial Council, *Annual Report 1992-93* at 14, art 10.
  42. See the *Courts of Justice Act*, RSO 1990, c C.43, s 123(5) and the *Judicature Act*, RSPEI 1988, c J-2.1, ss 26(6)–(7). By contrast, the Washington State constitution requires that judgments be rendered within 90 days of hearing and suspends the salary of any judge who has a decision "uncompleted or undecided for more than six months": *Washington Constitution*, Art 4, § 20 and *Revised Code of Washington*, §§ 2.04.092 and 2.06.062.
  43. 1998 BC Supreme Court *Annual Report* at 1–2 [emphasis added].
  44. In the six-month study period.
  45. In the six-month study period.
  46. Data compiled from the Supreme Court Reports and statistics.
  47. Chief Justice McLachlin, as she then was, indicated in conversation with the author that some of the delay may relate to the need for translation and review for publication.
  48. Average length of time between hearing and judgment for all decisions.
  49. Average length of time between hearing and judgment for all decisions.

# ETHICAL MEDIATION

By M. Ali Lakhani, Q.C.

One of Socrates's principal criticisms of sophistry was that the sophists deployed rhetoric, the art of persuasion, without any necessary regard to an ethical *telos*. Their skill was functionally utilitarian: it aimed principally to win arguments, not necessarily to achieve moral outcomes. For philosophically minded lawyers, the dilemma of harmonizing rhetoric and justice is not uncommon. The lawyer is meant to dutifully advocate the client's position, however distasteful or morally dubious, leaving the business of judging to others.

In the context of mediation, where mediators act merely as intermediaries between disputants to facilitate their arriving at a settlement, the issue of ethics takes on a different dimension: while, unlike a barrister, the mediator is not an advocate, and indeed must observe the canon of mediation neutrality, the mediator's dilemma is to reconcile neutrality with ethical mediation. It is trite that many conflicts are rooted in allegations of ethical transgression—a broken promise, an inequitable bargain, a breach of trust, a tort, a broken marriage—and that ethics are vital to both dispute prevention and resolution. Yet, mediators are understandably uncomfortable with being ethical advocates—and indeed it is not their role to be the “moral police”; however, there is a vital and necessary role for mediators to assume in importing ethics into mediations.

In mediation, ethics is “the river that runs through everything”. Ethical enculturation is the key to dispute prevention. Moral suasion is vital to bringing reluctant parties to mediation. An “ethical buy-in” enhances the prospects of a successful outcome, and once a mediated settlement agreement (“MSA”) is obtained, it is only genuine ethical commitment that will prompt parties to honour its terms.

The author of this article not only is a practising lawyer, but also has conducted mediations, acted as counsel in mediations, been a party to mediations and has helped shape the mediation procedures for the Ismaili Conciliation and Arbitration Board (“CAB”), the body established by His Highness the Aga Khan under the 1986 Ismaili Constitution to, *inter alia*, conduct ethical mediations. Ismailis have a longstanding tradition, extend-

ing over centuries, of attempting to resolve disputes amicably, and CAB's Rules for Mediation and Conciliation Proceedings<sup>1</sup> refer to its process as being "in conformity with the Islamic concepts of unity, brotherhood, justice, compassion, equity, tolerance and goodwill".<sup>2</sup> CAB's services are quick, confidential and generally free. They can be accessed by any Ismaili (even when the other disputant is not an Ismaili) and are provided by professionally trained mediators who handle commercial, matrimonial and other family-related disputes. Cases are confidentially audited for follow-up and evaluated for dispute prevention and to improve mediation processes. CAB operates within a community network of sister institutions (including, for example, economic planners, social workers and educators) to whom CAB "plays back" its root cause analyses so that corrective measures (such as prudent planning or proper business documentation) can be taken to prevent future disputes.

CAB is probably the only ADR institution in the world for whom ethical mediation is a central feature. The impetus for this was the Aga Khan's insistence on ethical literacy, on educating people "who can reason morally whenever they analyze and resolve problems, who see the world through the lens of ethics, [and] who can articulate their moral reasoning clearly".<sup>3</sup> In 2015, the author assumed the task of developing an Ethics Training Module ("ETM") for CAB to encourage ethical literacy among its mediators and to promote ethical mediations. This article, based on a recent training session for CAB trainees worldwide, sets out certain key features of the ETM.

## ETHICAL MEDIATION

The terms "ethics" and "morals" are used interchangeably, but there is a significant distinction between them that is important for our purposes: ethics, unlike morals, implies an ethos, a way of seeing how values relate to the universal principles from which they derive. There are, of course, many theories of ethics (e.g., virtue ethics, deontology, consequentialism), and one cannot always know or predict the ethical influences of mediators or disputants. They will come from diverse cultural and ethical backgrounds. Therefore, one must seek to appeal to universal ethical principles, transcending ideological divisions. Within CAB, as elsewhere, the appeal is to principles rooted in our underlying human interconnectedness. This enables a mediation to be founded on certain basic ethical ideas rooted in the respect for our common humanity.<sup>4</sup>

The ETM delineates nine basic ethical ideas, in groupings of three:

1. Harmony

2. Dignity
3. Integrity
4. Collaborative Engagement
5. Empathy
6. Fair Dialogue
7. Equity
8. Moral Reasoning
9. Healing

The first grouping (harmony, dignity, integrity) addresses the internal orientation expected in the mediation—"right intention".

The second grouping (collaborative engagement, empathy, fair dialogue) addresses the external orientation expected in the mediation—"right conduct".

The third grouping (equity, moral reasoning, healing) addresses the purposive orientation expected in the mediation—"right outcome".

In CAB, this threefold orientation, described by the Arabic terms "*niyat*" (right intention), "*adab*" (right conduct) and "*amanat*" (right outcome, literally, "fulfilling one's trust"), is the foundation for ethical mediation.

## PRACTICAL TOOLS

The ETM offers nine practical tools for conducting an ethical mediation:

1. Adopting the Ethical Lens
2. Obtaining an Ethical Buy-In
3. Ethical Advocacy
4. Identifying Ethical Blockages
5. Building Trust
6. Creative Collaboration
7. Moral Reasoning
8. Reality Testing
9. Ethical Bandaging

Each is considered in turn below.

### 1. Adopting the Ethical Lens

It is usual to think of mediations as a triangulated relationship between the mediator and the (usually) two parties. Viewed thus, the task of the media-



tor is to manage the other two points of the relationship. The ETM adopts a different visual model for ethical mediations by introducing the dimension of verticality, shifting from a triangulated to a pyramidal relationship. The pyramid's apex represents the ethical criterion, the basis on which the mediation is to be conducted, a reminder that it is to operate on the basis of the "ethical mantra" of the "right intention", the "right conduct" and the "right outcome". The apex is the ethical "north star" and the mediation's normative orientation. This ethical framework, denoted by the ethical pyramid, is one that must be constructed collectively by the mediator with the parties from the outset of the mediation by an "ethical buy-in" (discussed below). By urging the parties to adopt an ethical lens, the mediator effectively helps them to mediate ethically and improves the prospects for a successful mediation.

Often, ethical objectives are lost sight of in the context of self-interested bargaining. It is therefore important from the outset for the mediator to identify the ethical issues, and to see how the parties themselves are framing them. Is the dispute defined in moral terms, as an unfair contract, or unjust behaviour such as a broken promise? What language of moral justification is being used by the parties to set out their grievances? During the intake process for the mediation, the parties should be encouraged to state the nature of their dispute in moral terms, not merely legalistically. This will be important for addressing proposed ethical solutions.

## 2. Obtaining an Ethical Buy-In

At the all-important first meeting, in which the mediator explains the mediation process and their respective roles to the parties, it is important to establish the ethical ground rules and to obtain a commitment from the parties to engage ethically. Indeed, it is recommended that this commitment be a condition of the mediation agreement.

The mediator should invite the parties to adopt internal, external and purposive orientations conducive to a successful mediation. In CAB, it is considered best practice for mediators to detail each of the nine ethics, and to explain their purpose in relation to these orientations, and thereafter to seek a commitment from the parties to conduct the mediation based on them. Mediators should clarify that they will not impose their personal values on the parties but will require them to honour CAB's ethical culture.

This is how the nine ethics are framed under the ETM:

### Internal Orientation: *Niyat* (Committing to the Right Intention)

- *Harmony*: The parties are encouraged to view this as a dispute among friends seeking a harmonious resolution.

- *Dignity*: The parties are encouraged to recognize the intrinsic worth of each other, as a corollary of our common humanity. This will conduce to respectful and decent conduct, recognizing that each person, even if one disagrees with their viewpoint, has an inner dignity.
- *Integrity*: The parties are encouraged (in the famous words of Polonius to his son, Laertes, from Shakespeare's *Hamlet*) to be true to themselves in order to be true to each other.

**External Orientation: *Adab* (Committing to Ethical Behaviour)**

- *Collaborative Engagement*: The parties are encouraged to collaborate with each other to find creative solutions in a spirit of compromise.
- *Empathy*: The parties are encouraged to appreciate the other's viewpoint, to listen with sensitivity, without hostility or prejudice.
- *Fair Dialogue*: The parties are encouraged to collaborate in creating the conditions for fair dialogue by being respectful, giving each other room to speak and listen, offering fair and constructive criticism, and communicating with integrity and kindness.

**Purposive Orientation: *Amanat* (Committing to Fair and Healing Outcomes)**

- *Equity*: The parties are encouraged to seek fair outcomes, focused on the common interest in the spirit of compromise.
- *Moral Reasoning*: The parties are encouraged to provide ethical justifications for their proposals.
- *The Ethic of Healing*: The parties are encouraged to seek a genuine mending of their relationship in a spirit of healing.

In practice, it may not be possible to secure an ethical buy-in for each element. For example, a party who has a legalistic advantage (such as a missed limitation period) may not want to commit to an equitable outcome, or sometimes the parties will be reluctant, due to deep-seated mistrust or inveterate truculence, to mend their relationship. In CAB, the mediators have communal supports that may not exist in other ADR settings. At a minimum, a commitment to an ethical internal and external orientation and to moral reasoning should be insisted on for ethical mediation. If those minimum elements are not present, it is unlikely that the mediation will succeed.

### 3. Ethical Advocacy

In reconciling ethical advocacy and mediation neutrality, one should distinguish between insisting on ethical processes (something not only permissible, but part of the mediator's responsibility) and foisting on the parties

one's own substantive ethical judgments (this violates mediation neutrality). The distinction is between fostering an enabling environment for ethical mediation and advocating outcomes based on one's personal morality.

Because one can inadvertently cross the line between fostering ethical mediations and promoting a personal ideology, it is important for a mediator to be vigilant about personal biases. The mediator's life experiences may colour their views and create an intrusive ideological bias. For instance, a mediator who has experienced a difficult marriage might view a matrimonial dispute through that lens, or a mediator coming from a dysfunctional family or business context might be coloured by that experience. To a hammer, everything appears as a nail, and therefore the mediator must be careful not to let their moral judgments intrude.

Instead, the aim is to let the parties make their own bargain. So long as the mediator is satisfied that a fair process was followed, if the parties are satisfied with their bargain, it is not for the mediator to disrupt it, even if the outcome does not conform to the mediator's own sense of what is fair. The mediator must respect the pluralism of the parties, appreciating that people come from diverse backgrounds and sensibilities, for which due allowance should be made. For instance, there are many different models of marriage, with no "one size fits all". Some marriages might function well even if they do not fit the mediator's personal sense of fairness. A feminist mediator, for example, might believe that a wife is being too compliant, but compliance might be part of the compromise that works in that particular marriage, and absent undue influence, it will not be for the mediator to upset the balance between the spouses by criticizing the functioning norms of the marriage.

The mediator's role is to advocate fair processes and sound moral reasoning, and then to stand aside and let the parties make their own bargain.

#### **4. Identifying Ethical Blockages**

An "ethical blockage" is a potential impediment to the mediator's being able to secure an ethical buy-in from the parties, or is something that obstructs the ethical flow of a mediation. There are three types of ethical blockages.

##### **Internal blockages**

An internal blockage is a negative attitude or value that is not conducive to ethical mediation. Negative attitudes, such as viewing the other party in a purely adversarial or demeaning way (contrary to the ethics of harmony or dignity), will obstruct an ethical mediation. A mediated settlement might be possible even in the face of such barriers (for example, where the only negotiation is over money, and is driven by non-relationship-based considerations), but the process is likely to be hard-nosed and unpleasant, and may well fail.

An internal blockage may also be a function of value differences—for example, a desire to exploit legalistic or practical advantages at the cost of ethical outcomes.

It is important for the mediator to identify the attitudes or values that might impede an ethical mediation, to understand their cause and, where possible, to address it to secure an ethical buy-in.

### **External blockages**

An external blockage arises where a non-party (what we might term a “phantom party”—someone who is not at the table but “calls the shots” or, to use a different metaphor, “pulls the strings”) exerts undue influence. Not every external involvement will be undue influence. For example, some non-parties act as legitimate advisors, and others, such as lawyers, should usefully be involved before the signing of an MSA to ensure that the settlement is understood and voluntarily entered into.

It is important for the mediator to identify a phantom party and, where appropriate, either neutralize that person or involve them constructively in the process.

### **Relational blockages**

A relational blockage deals with a power imbalance that undermines collaborative and fair bargaining. Often this signals an internal or external blockage, and sometimes it is accompanied by threats or perceived fear or disempowering dependence.

It is important for the mediator to identify power imbalances that threaten ethical bargaining and to distinguish between preventing undue influence and refraining from interfering with ethical processes simply because they result in a bargain that offends the mediator's personal sense of fairness.

*The iceberg principle:* An ethical blockage may surface when the mediator seeks the ethical buy-in at the outset, but more often than not, it may remain latent. The challenge is to address latent blockages. The “iceberg principle” refers to the idea that the dispute presented for mediation may not be the real dispute; it is only the tip of the iceberg. The real dispute often lies submerged and must be skilfully discovered by the mediator. In assessing the root causes of a dispute, the mediator must therefore try to look beneath the surface or apparent dispute to discover underlying ethical blockages.

Usually, mediators confine themselves to addressing the submitted dispute and consider it improper to stray from that mandate. But by adopting a wider lens regarding the underlying reasons for the submitted dispute, the mediator is not in fact straying, but merely addressing the dispute's root

causes. The mediator may need to explain this to a party who expresses any discomfort and to respect personal bounds of privacy.

A deeper probing of the issues and of the parties' psyches will require the mediator to combine the skills of both psychiatrist and investigator, and through a process of vigilance and patient questioning, particularly through private meetings where the parties can speak more freely, to seek a deeper understanding of potential ethical barriers. In order to do this, the mediator must first win the confidence of the parties and build their trust. Because the nature of the true dispute may be deeply personal, there are techniques that a trained mediator can adopt to tease out the underlying issues. CAB's mediators are trained to look for clues in how the parties define the dispute and what they say about each other, to understand the cultural climate in which the parties have operated (for example, was there a second set of books in a business dispute, or are there undisclosed assets in a marital dispute?); their view of the history of their relationship, particularly in matters of trust (what caused the mistrust or resentment, and when did this deterioration in relationship begin?); and whether there was a triggering event (a business success or failure, for example) or third-party influence that precipitated the dispute. The mediator will need to drill down, usually privately. Many disputes are fuelled by deep-seated resentments. These can be the result of threatened or bruised egos (stoked, for example, by envy, harboured grudges or a sense of vindictiveness). They can also develop out of deep fears or mistrust, which may or may not be capable of being mended in the course of the mediation. It will be important for the mediator to explore the causes (where has this fear originated? can it be countered? where is this mistrust coming from? can the relationship be healed?). The ETM for CAB offers sample scripts for conducting such interviews.

Once an ethical blockage has been identified, a strategy for addressing the blockage can be targeted. If the blockage relates to a mindset where one party views the other in purely adversarial terms and therefore treats the other with resentment or in a demeaning manner, the mediator can emphasize certain ethical principles and encourage their adoption in the mediation. For example, the ethic of harmony does not require the parties to agree: harmony does not mean sameness, but merely a respect for pluralism—that we will respect one another despite our differences. The ethic of dignity is founded on the idea that we each have an inner worth and that by dehumanizing the other we dehumanize ourselves. The parties need to be properly invested in the process, and this is best achieved by bringing to the mediation the ingredients necessary to a collaborative and fair process, as outlined in the ethical buy-in.



## 5. Building Trust

No mediation will succeed unless the parties can learn to trust the mediator. Eventually, such trust can enable the mediator to promote trust between the parties. Building trust is a delicate process because trust must be earned. This will be particularly difficult where it has been broken. In many cases there is deep-seated mistrust. The mediator will have to encourage the parties through private conversations to disclose the full context of the dispute, and the nature of their relationships, hopes and fears. To build trust, it is important to act humanely, without being judgmental. Mediators must earn the trust of the parties individually, through a process involving empathetic, sensitive and attentive listening; affirming that the parties' concerns have been appreciated; reassuring them they will be protected through a fair process; keeping their confidences; honesty and neutrality; and above all being soft on the person, even if hard on the issues.

Trust is not a matter of entitlement. It has to be fostered through small steps, not by demanding a single leap over the chasm of mistrust. This process of earned trust will require testing it in little ways before requiring bigger trust commitments, encouraging the parties to acknowledge hurts and to affirm a willingness to cooperate.

## 6. Creative Collaboration

A successful mediation will require teamwork. The mediator's role is akin to that of a sports coach tasked with motivating two reluctant team members to work together collaboratively. The parties must be encouraged to help themselves by helping one another. An inspiring example comes to mind. In the 1958 Hollywood movie *The Defiant Ones*, two prisoners, one white (played by Tony Curtis) and the other black (played by Sidney Poitier), resentfully shackled together, manage to escape. Unable to cast off the physical chains that bound them (also a metaphor of the racial prejudices of the American South), they had to cooperate to survive. Gradually, despite their mutual hatred, they came to appreciate their intrinsic humanity and overcame the divide.

The parties to the mediation are similarly shackled by their relationship and their shared dispute, which requires them to collaborate in finding a solution. By working together under the facilitative guidance of the mediator, they can achieve this. The mediator, like the sports coach, must motivate them to do so, encouraging them to seek creative solutions and to bring to the table a collaborative spirit of give and take.

## 7. Moral Reasoning

How can one direct a fair outcome in a mediation without violating mediation neutrality? It is important for the mediator to place the onus of fairness

on the parties themselves. They must consider whether and why their conduct or proposals are fair, and be encouraged to use moral reasoning to justify their positions. Is a position ethically justifiable? Is a bargain fair? The proponent should be asked to explain why and how it is. This is a legitimate demand for the mediator to make: "If you want me to sell this proposal to the other party, first justify to me why it's fair."

The mediator should use moral suasion and the language of ethics, evoking the ethical buy-in, to encourage the parties to focus on fairness, equity, the spirit of compromise, the common interest rather than mere self-interest, generosity, kindness and compassion. Confronted with the ethical dimension, an unethical party will have to face their own conscience. If, through this process, the mediator is to effectively hold up a mirror to the parties, this will need to be done with sensitivity, in private, without being judgmental, letting their own positions reflect back to them their own egoic barriers, and allowing them space for catharsis.

## **8. Reality Testing**

A useful tool in combatting unfair proposals is reality testing. It is engaged when a proposal is premised on certain factual assumptions that the mediator suspects are untrue. For example, if a party is suspected of hiding assets, the mediator may need to test the facts. A typical case is where a wealthy husband, in order to deprive his estranged wife of fair provision, conceals his assets or inflates his liabilities. A mediator can ask for financial corroboration such as tax statements, valuations or underlying contracts. While there is no way to compel these through the limited mediation process, the duty to disclose them is an aspect of the ethic of integrity. Even if a party is reluctant to disclose the documents to the other party, the parties should be honest with the mediator. This should be explained by the mediator, who should emphasize that certain information shared privately by a party with the mediator will remain confidential between the mediator and that party. The mediator must be in a position to ascertain that the parties are being honest and ethically transparent.

## **9. Ethical Bandaging**

Unlike most other ADR providers, CAB's mandate extends beyond resolving the narrow dispute to healing the relationship itself—what, in CAB, is referred to as "bandaging the wounds". As its mediators are taught, this is to be attempted only when the parties are receptive, and even then, only if the level of trust built up with the mediator and the mediator's own comforts, skills and understanding of the root causes justify intervention. Otherwise, in appropriate cases, the mediator is encouraged, with the parties' consent,

to refer the matter to a specialist such as a trained social worker, counsellor, doctor or psychiatrist.

Some of the matters that the ETM emphasizes for healing are that forgiveness is a matter of enlightened self-interest because it removes the poisons from the person doing the forgiving, but is effective only if genuine; that reconciliation requires a basis in truth (hence the phrase “*truth* and reconciliation”) and so past perceived misconduct cannot simply be ignored but must be addressed with a foundation of genuine repentance, empathy and compassion; that an apology cannot be forced, and is powerful only if genuine, and if so, even where it is not accepted, it may help the person apologizing to heal; and that a wound, even if it is bandaged, will require time to heal.

## CONCLUSION

In view of the burdens on the courts, the frustrations of costs and delays, and issues of access to justice, there is growing interest in ADR, particularly mediation. But most mediation services do not have a coherent design for ethical mediations. While there is an appreciation among mediators for such a structured design for ethical mediations, this is a relatively new and developing field. It is hoped that this article, which outlines the main elements of the ETM developed by the author for the Ismaili CABs worldwide, and which is unique in the field of mediation, will contribute to the development of best practices for structured ethical mediations.

## ENDNOTES

1. Online: <the.ismaili/sites/default/files/rules\_for\_mediation\_and\_conciliation\_proceedings\_final\_-\_oct\_2015.pdf>.
2. *Ibid*, Recital A.
3. His Highness the Aga Khan, University of Alberta Graduation Address delivered in Edmonton, Alberta on 9 June 2009, online: <www.akdn.org/speech/his-highness-aga-khan/graduation-ceremony-university-alberta>.
4. For Muslims, this derives from the metaphysical concept of intrinsic oneness (known in Islam as *tawhid*),

which His Highness the Aga Khan has referred to as an “all-encompassing unity” whose roots lie in the understanding that humanity has a common patrimony, being created from a “single soul” (Quran, *Surah al-Nisa*, 4:1). Similar ideas underlie not only other faith traditions, but also secular ideas of universal principles that inform values such as human rights and individual freedoms.

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# THE WINE COLUMN



By Michael Welsh, Q.C.\*

*"Where there is no wine there is no love".*

—Euripides



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\* Michael Welsh, Q.C., is a bencher, although he does not write or drink in that capacity. His views expressed here are entirely his own. Both the author and the Advocate endorse healthy and responsible attitudes towards alcohol.



## THE NAKED GRAPE: WINE AND CLIMATE CHANGE

As acclaimed wine writer Jancis Robinson said in an e-mail to her readers recently, “The latest report from the UN’s Intergovernmental Panel on Climate Change (IPCC) is truly scary. Those of us who follow wine closely have seen the warning signs for years. Our hearts go out to all those living in constant fear of the catastrophic effect of drought ... wildfires, ... on the American west coast, in the eastern Mediterranean or in Australia.”

Surviving yet another summer of intense heat and smoke in the Okanagan Valley and reflecting on Robinson’s words took me back to an article I wrote years ago in 2009. I dust it off, noting that in the intervening years matters seem to have become mostly worse, seldom better.

When I first drafted this article in 2009, countries were gathering at the Copenhagen Climate Change Conference leading to the Copenhagen Accord, followed several years later by the Paris Climate Accords. These accords have not met their goals in limiting global warming. As I revise this article, another global conference, the UN Climate Change Conference, is set for Glasgow at the end of October 2021. Whether the nations have the will to make the more radical changes necessary to prevent the world overheating remains to be seen.

And now to my repurposed column, with brackets indicating my 2021 updates.

\* \* \*

My attention was caught by a web article titled “Posing Naked to Save French Wine”. While I guiltily admit to sharing the general preconception, best put by Henry Higgins in *My Fair Lady*, that “the French never care what they do, actually, as long as they pronounce it properly”, I was still intrigued. On October 3, 2009, 713 French citizens posed in the buff in a French vineyard while idiosyncratic photographer Spencer Tunick snapped away. Luckily for them, it was a sunny day. Tunick, an American, is well known for his installations featuring large numbers of naked people posed in artistic formations. These include 7,000 in sunny Barcelona, 2,754 in less sunny Cleveland and 1,800 in downright chilly Buffalo. The biggest mass of naked flesh was a group of 18,000 draped around the Zócalo in Mexico City. He has turned his attention to global warming, posing 600 hardy naked souls as a “living sculpture” on the Aletsch Glacier to draw attention to the shrinking of the world’s glaciers. This was done in collaboration with Greenpeace. [More recently, in 2011, Tunick photographed 1,200 volunteers around the threatened Dead Sea and on July 18, 2016, he photographed 100 nude women in Cleveland, Ohio, where the Republican National Conven-

tion was being hosted with the theme “shine the wisdom of women to change the world”.]

That happy collaboration has moved to the world of wine. The “back label” story is a new report issued by Greenpeace last fall [2009]. The naked Burgundians in Tunick’s photographic work assembled to issue a warning on the potential threat to French vineyards from global warming, hoping they would be heard by delegates to the UN Climate Change Conference, held in Copenhagen just before this last Christmas [2009]. The Greenpeace report, *Changements climatiques et impacts sur la viticulture en France/ Impacts of Climate Change on Wine in France*,<sup>1</sup> was issued concurrently with the Tunick photographs.



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That report focuses on the effect global warming will have on Burgundian wines. If the world of wine is likened to the coal mine, then Burgundy is the canary. For it is in Burgundy that the concept of *terroir* finds its apothecosis. As the Greenpeace report says:

Great French wines derive all their finesse and elegance from their *terroir*. The idea of *terroir* alludes to the very specific combination of climate and a well-defined territory, sometimes no bigger than a single plot of land ... [Wine] is the product of an exquisite alchemy between the age-old know-how of impassioned men and women and the environment, and as

such reveals all the subtlety of its original terroir. If climate change persists, this heritage will not survive.

Romanée-Conti, with its haunting aromas of ancient earth and spice, and considered by many to be the finest pinot noir wine in the world, comes from a single 4.46 acre vineyard in Burgundy's Côte d'Or that has its own famous appellation: DRC (Domaine de la Romanée-Conti). "No piece of land is more carefully monitored and tended than DRC's (except perhaps certain well-guarded plots in Colombia). Every nuance has been known for centuries, such as how the slope's rocks absorb sun during the day and then release it at night, for a slow maturation of the grapes."<sup>2</sup> The vineyard output is only 8,000 cases per year (compare that with Château Lafite Rothschild in Bordeaux, which generally produces over 20,000 cases per year).

But things are changing in France. As the Greenpeace report notes, there have been summer heat waves in years such as 2003 that shriveled grapes on the vine, hail storms in Bordeaux and movement north of grapevines diseases previously found only in Mediterranean vineyards. With a rise in temperature, pinot noir grapes generally become "overblown", with flabby stewed fruit flavours and high sugar (which translates to high alcohol). The report suggests that if average temperatures rise by even four degrees, "vineyards will be displaced more than 1,000 km beyond their traditional boundaries by the end of this century". With current emission levels uncontrolled, temperatures are projected to rise by up to six degrees in that time-frame. Again, to quote from the Greenpeace report, "In the long term, the present climate conditions in Burgundy that give the region's wine its specificity will have disappeared, as this region will be confronted with a 'Mediterranean' type climate."

The same worries are arising in many grape-growing regions. The Spanish Wine Federation is initiating a project to investigate vineyard practices that delay maturation. Spain has more grape acreage than any other country. It is also Europe's driest country and, due to global warming, is facing desert conditions in up to one third of its territory. Current higher heat and increased sugars mean that vintners have to harvest the grapes early when they still have green unripe flavours in order to keep potential alcohol in balance, or wait and then remove the excess alcohol after fermentation. Only the higher altitude vineyards with their cooler nights may survive in the longer term.

Here in the relatively new northwest wine-growing regions of British Columbia, Washington, Oregon and Idaho, winemakers are already discussing having to change the varieties grown if temperatures rise even two to four degrees. Researchers at Southern Oregon University are studying

the correlation between climate change and viticulture. Again, Oregon's wineries focus on pinot noir wines. Just as they are building a worldwide reputation for elegance and finesse, consideration is being given to what should replace them if Oregon gets too hot.

[This fall, a well-regarded winemaker in the Penticton area told me that due to climbing general summer temperatures, the best area for his top-end pinot noir has moved from the lower to the very top of the slopes in his vineyard.]

[At the time I wrote this earlier article,] the Copenhagen Conference was a focus of discussion on the news, with developed countries such as Canada and the United States issuing statements that continued the foot-dragging and state of denial. Whether the priceless wines of Burgundy or the Moselle will survive remains in doubt. It is enough to drive you to drink, but soon that may no longer be a good French pinot noir. Instead we can look forward to Domaine de Dease Lake.

\* \* \*

With all this doom and gloom, I discuss a few wines from home and abroad, mostly from cooler climate areas (at least for now) that have impressed me in recent imbibing.

#### JOSEPH MELLOTT SANCERRE LA CHATELLENIE 2019

AOC Sancerre #297127 \$45.00 (approx.)

From the Loire Valley, home of refined sauvignon blanc, this wine displays crisp lemon-lime and notes of grapefruit and green peach and some minerality on the nose. The flavours have the same notes along with a hint of tropical green mango, pineapple and lemon curd and a hint of oak leading to a long, clean, refreshing but tart finish with good mouthfeel that is perfect for seafood. Crab, prawns, halibut or salt-crusted ling cod would be excellent dinner partners. We had it with a rich white fish (grilled halibut) and grilled vegetables. It is available at private wine stores such as Legacy Liquor Store and Everything Wine.

#### CARMEN QUIJADA SEMILLON 2018

D.O. Apalta, Chile #149082 \$40.00 (approx.)

This is a sublime Semillon that scored 90 points in *Decanter* magazine in 2019. The Apalta wine region is part of the Colchagua Valley and its alluvial soils are planted primarily with Bordeaux varietals. The name means "poor soils" in the local dialect. This wine has a tight, firm nose and texture, with McIntosh apple, lemon and floral notes and a bit of vanilla on the nose. On

the round, full palate are white peach, lemon curd, cantaloupe with some almonds and wet stone on its long, creamy finish. While it is ready for drinking now, it has, like many well-made Semillons, good cellaring potential. This wine will pair well with richer fish or seafood dishes, but also with poultry or pork dishes. We had it with baked chicken thighs and a parsnip risotto. Again, you can find it at private stores like Legacy Liquor Store, Everything Wine or Marquis Wine Cellars.

#### **KEN FORRESTER OLD VINE RESERVE CHENIN BLANC 2019**

**Stellenbosch, South Africa #120202 \$21.99**

South Africa is a leader in chenin blanc wines in recent years. This wine has an immensely rich nose of tropical fruit—mango, papaya, pineapple—mixed with lemon, orange peel and a bit of minerality. The flavours are similar with additional lashings of ripe peach, apricot, honey, vanilla, some butter and soft oak. It finishes long and bright with good acidity. James Suckling gave it 90 points. It is from a mix of barrel- and tank-fermented fruit and is perfect for seafood dishes like Coquilles Saint-Jacques or cracked crab or lobster. Also good will be chicken breasts in a creamy lemon-garlic sauce or pork chops with a fruit salsa. Indian food is another good option.

#### **FAIRVIEW CELLARS CROOKED POST PINOT NOIR 2018**

**BC VQA Okanagan Valley \$30.00 (approx.)**

From two Oliver vineyards (Eagle Bluff and Fournier), this is a medium red with bright aromas of red currant, violets, vanilla and a bit of green herbs. The flavours are of raspberry, sour cherry, fresh cranberry with some oak and smoke and a bit of leather in the background. It finishes tart but long. It is still a little tight, and I suggest decanting. It will pair with rich salmon, chicken or pork dishes, veal or an assortment of cheeses. This wine is available from the winery just beside the Fairview golf course in Oliver, or in private wine stores like Legacy Liquor or Marquis Wine Cellars.

#### **WOLF BLASS MAKERS PROJECT PINOT THREE 2019**

**Adelaide Hills, Australia #99289 \$19.99**

This blend of pinot noir, pinot gris and pinot meunier had partial whole berry fermentation (the technical term for it being whole-berry maceration). It has pure fruit flavours and subtle yet distinct spice characters, with cherry, black currant and dusty cocoa aromas and black cherry, plum, black currant, smoky oak, green tobacco flavours and a medium-long finish. Try



it with duck or other gamier poultry, baked or BBQ salmon or halibut, or a charcuterie.

## STAG'S HOLLOW HERITAGE BLOCK BLEND 2019

BC VQA Okanagan Valley #115972 \$27.99

Almost a Meritage or Bordeaux blend, this is a combination of merlot, cabernet franc, syrah and cabernet sauvignon. It is unfinned and lightly filtered to minimize loss of character. Its aromas are of cassis, black raspberry, cherry and cigar box and spice, and flavours are of the same dark fruit mixed with smoke, vanilla and chocolate, and dried herb undertones on a smooth, long finish. Good food choices are tomato-based pastas, a cassoulet, or a steak with a gremolata.

### ENDNOTES

1. Online: <[issuu.com/greenpeace\\_eastasia/docs/impacts-of-climate-change-on-w](http://issuu.com/greenpeace_eastasia/docs/impacts-of-climate-change-on-w)>. The report was initially in French but is now translated into English. The full set of Tunick photographs from this shoot can be found at <[thespencertunickexperience.org/2009-09\\_Macon\\_France/Macon\\_France.htm](http://thespencertunickexperience.org/2009-09_Macon_France/Macon_France.htm)>. His general portfolio is found at <[www.artnet.com/awc/spencer-tunick.html](http://www.artnet.com/awc/spencer-tunick.html)>.
2. Natalie MacLean, *Red, White and Drunk All Over: A Wine-Soaked Journey from Grape to Glass* (Anchor Canada, 2007) at 14.

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NEWS FROM

# LAWYERS' RIGHTS WATCH CANADA

By Catherine Morris\*

## ACCESS TO JUSTICE: DEFENDING DEFENDERS AND TRUTH-TELLERS IS FUNDAMENTAL TO THE RULE OF LAW

Equality of access to independent and impartial remedies for injustices is fundamental to international law understandings of the rule of law.<sup>1</sup> Equal access to justice requires the independence of judges and lawyers, integrity of legal systems, recognition of the right to legal aid,<sup>2</sup> and laws that respect and implement international human rights law.<sup>3</sup> Attacks on lawyers and human rights defenders have the effect of denying clients their internationally protected right to independent, effective legal representation and fair trials.<sup>4</sup> Since LRWC's last report in the *Advocate* in May 2021, LRWC has intervened in a number of situations, including (in alphabetical order) Afghanistan, Canada, China, Myanmar and the Philippines.

### Afghanistan: Reprisals Against Judges, Lawyers, Human Rights Defenders and Journalists

International focus on the grave human rights situation in Afghanistan intensified after the Taliban's armed takeover of the country on August 15, 2021. Those who have advocated for implementation of international human rights and the rule of law are in particular danger, including judges, prosecutors, lawyers, human rights defenders, parliamentarians and journalists. Women jurists and defenders are especially at risk.<sup>5</sup> Others in grave danger are religious and ethnic minorities,<sup>6</sup> as are LGBTQ+ people.<sup>7</sup>

There are also fears for the safety of victims and witnesses of atrocity crimes<sup>8</sup> and those who collected evidence<sup>9</sup> of war crimes allegedly com-

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\* Catherine Morris has been the transitional executive director of Lawyers' Rights Watch Canada ("LRWC") on a pro bono basis since June 2020. She has volunteered with LRWC for more than two decades and serves as its Main Representative at the UN Human Rights Council. LRWC has held special consultative status with the UN Economic and Social Council since 2005.

mitted over the past 20 years.<sup>10</sup> Suspected perpetrators include the Taliban, the Afghan National Security Forces and the Northern Alliance in Afghanistan, as well as nationals of other countries including the United States,<sup>11</sup> Canada,<sup>12</sup> Australia<sup>13</sup> and the United Kingdom.<sup>14</sup> Without the securing of evidence, victims of war crimes and other atrocities have no access to justice.

LRWC volunteers intervened at the UN Human Rights Council in August and September 2021,<sup>15</sup> joining the UN High Commissioner for Human Rights<sup>16</sup> and many non-governmental organizations (“NGOs”)<sup>17</sup> calling on the council to establish an independent international mechanism to protect and preserve evidence of past, present and future atrocity crimes and human rights violations. Protection of human rights reporters and defenders, and the collection and preservation of evidence for use in fair trials of suspected perpetrators, including at the International Criminal Court (“ICC”), are essential to ensure access to justice for victims of war crimes and other international atrocity crimes.<sup>18</sup>

### **Canada: Access to Justice for Atrocities Against Indigenous Children and Their Families**

Many Canadians have been deeply shaken by this year’s revelations of more than 1,300 unmarked graves of Indigenous children who died in or disappeared from residential institutions run by the Canadian government and churches for more than a century. While Canadians have been shocked into unprecedented awareness of undocumented deaths of First Nations’ children, this was not new information.

For decades, the peoples of Canada’s First Nations have been grieving the disappearances of family members and demanding truth and justice. The 2015 report of Canada’s Truth and Reconciliation Commission (“TRC”) documented concerns about thousands of undocumented deaths of Indigenous children in Canada’s residential institutions.<sup>19</sup> The 2021 revelations have resulted in unprecedented awareness of the credibility and gravity of claims of crimes against humanity and genocide made by Indigenous truth-tellers about violations perpetrated by authorities and churches in Canada. Yet those revealing these truths continue to be subjected to “denialism”<sup>20</sup> by those not ready to acknowledge the magnitude of the violations.

LRWC issued a statement<sup>21</sup> in June 2021 emphasizing that the families of disappeared children have the right to truth and the right of access to remedies for any unlawful deaths. LRWC’s statement pointed out Canada’s international law obligations to ensure thorough, prompt, impartial investigations of the circumstances of all undocumented deaths with full respect for victims’ families and communities. Canada’s duty to investigate also

applies to each unsolved case of missing and murdered Indigenous women and girls. International human rights standards require investigations to be capable of providing evidence sufficient to bring to justice all those found to be involved in unlawful deaths and ensuring redress to families of victims.<sup>22</sup>

LRWC is also concerned about the rights of Indigenous land rights defenders to advocate and peacefully protest without being threatened, attacked or criminalized.<sup>23</sup> LRWC has been concerned about attacks against Indigenous land rights defenders while engaged in peaceful protests against the use of their lands for pipelines or other purposes without free, prior and informed consent as prescribed by the *UN Declaration on the Rights of Indigenous Peoples* ("UNDRIP").<sup>24</sup>

LRWC volunteers intervened<sup>25</sup> at the September 2021 session of the UN Human Rights Council,<sup>26</sup> underlining the findings of UN experts that denial of Indigenous peoples' right to self-determination is "a root cause of atrocities, such as residential schools, murdered and missing indigenous women and girls or stolen children, as well as the negative impacts on health, economic and social well-being and justice".<sup>27</sup> While Canada and British Columbia have passed legislation toward implementing UNDRIP, Canada has failed to take adequate steps to ensure full redress for Canada's violations of Indigenous peoples' rights, including rights to land and resources.

### **China's Persecution of Lawyers and Defenders: A Strategy to Deny Access to Justice**

LRWC continues to express grave concerns about China's thwarting of access to remedies for violations of human rights, particularly since the beginning of the "709 Crackdown" (July 9, 2015) against hundreds of human rights lawyers.<sup>28</sup> China actively persecutes lawyers, defenders and journalists, subjecting them to arbitrary detention, enforced disappearance (incommunicado detention in unknown locations) and severe forms of torture. China also actively works to water down or resist UN resolutions addressing human rights violations in countries such as Afghanistan, Myanmar and the Philippines.<sup>29</sup>

### **Myanmar: Continued Increases in Extrajudicial Killings and Arbitrary Detentions**

The situation in Myanmar continues to deteriorate. Since our report in the May 2021 edition of the *Advocate*, the military junta's extrajudicial killings of civilians, including children, have increased to more than 1,100. Arbitrary detentions increased to more than 8,200. LRWC continued its advocacy for lawyers and defenders in danger in Myanmar by joining with other international NGOs in a statement to the September sessions of the Human Rights Council seeking a UN Security Council referral of the situation in Myanmar to the ICC.<sup>30</sup>

## The Philippines: Impunity for Murders of Lawyers Continues

Lawyers and defenders in the Philippines continue to suffer attacks and murders, the most recent being the murders of two human rights lawyers on August 26, 2021<sup>31</sup> and September 15, 2021.<sup>32</sup> Since 2016, dozens of lawyers and hundreds of human rights defenders have been murdered with impunity in the Philippines, as part of a systematic pattern of thousands of extrajudicial killings associated with President Duterte's "war on drugs". On September 15, 2021, the ICC Pre-Trial Chamber authorized the ICC Office of the Prosecutor to open an investigation into crimes against humanity in the Philippines.<sup>33</sup> The court found sufficient evidence to support an investigation into "widespread and systematic attack against the civilian population ... pursuant to or in furtherance of a state policy".<sup>34</sup> The Duterte government announced that it will not cooperate with the investigation, so in September 2021, LRWC joined numerous other international NGOs in an intervention at the UN Human Rights Council seeking a parallel investigative mechanism to support the collection and preservation of evidence for use in trials of suspected perpetrators of crimes against humanity.

LRWC's other interventions can be seen on its website at <[www.lrwc.org/category/publications/campaigns/countries/](http://www.lrwc.org/category/publications/campaigns/countries/)>.

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# LAP NOTES



By Michael Khan\*

## MAKING THE CASE FOR WELL-BEING

One early morning as I was driving to my job at the New Jersey Attorney General's Office, I found myself pounding the steering wheel. At home, I had already hit the snooze button countless times, so the "pounding the wheel" portion of my morning was the final "wake-up call" that I needed to do something different. For many of you, your signs of stress and unhappiness are not as dramatic but no less impactful. You realize at some level that you need to change something about your work and how you approach self-care. Some of you listen but many more ignore the message.

Fortunately, the legal community, often resistant to change, is beginning to seriously acknowledge the importance of wellness. An increasing number of jurisdictions in the United States and Canada have a wellness/mental health/substance abuse CLE requirement or at least allow well-being programs to satisfy CLE hours. Not only is this important on the human level, it is also a good idea for more practical reasons. Christopher Newbold, executive vice president of the Attorneys Liability Protection Society (a provider of lawyers' professional liability insurance in the United States), says, "If lawyers are not taking care of themselves, they generally are more likely to commit malpractice, and our experience in claims handling supports that" (Christine Simmons, "Law Firms Face Malpractice Risk Over Substance Abuse, Poor Mental Health", *New York Journal* (28 November 2018)). Looking at systemic changes is outside the purview of this article, but law firms must get on board as well. Newbold says that "[w]e're creating cultures in law firms that are misaligned with the values of taking care of one another."

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The recent National Task Force on Lawyer Well-Being report (*The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, available at <lawyerwellbeing.net>) concluded that “lawyer well-being issues can no longer be ignored” due to “an elevated risk for mental health and substance abuse disorders”. In addition, the report says that many lawyers are not “thriving” and are experiencing “a ‘profound ambivalence’ about their work”.

Having “made the case” for wellness the remainder of the article will offer interventions for improved well-being.

## CHALLENGE AUTOMATIC NEGATIVE THOUGHTS

Billable hours, financial strains and life events are well-known stressors. Add to that common lawyer personality traits and you have a toxic cocktail impacting well-being. These traits include perfectionism, pessimism, intolerance for weakness, hypercriticism and unrealistic standards of achievement. These traits make lawyers more susceptible to negative thoughts (“I’m a failure”, “I always [or shouldn’t] make mistakes”, “My life sucks”), which impact mood and behaviour. Also called self-talk, these negative thoughts often go unchallenged. The thoughts sometimes have grains of truth but are warped versions of reality. Some common categories of negative self-talk are set out below (from David Burns, *The Feeling Good Handbook* (Penguin, 1999) and John Grohol, founder of PyschCentral). Consider whether you fall into some of these traps, as many of us do:

- **Filtering:** You magnify the negative details of a situation while filtering out all positive aspects.
- **Polarized thinking (also called “all-or-nothing” thinking):** You think you are either perfect or a complete failure.
- **Overgeneralization:** You arrive at a general conclusion based on a single incident or piece of evidence. You see a single, unpleasant event as part of a never-ending pattern of defeat.
- **Catastrophizing:** You expect disaster to strike, no matter what. You use “what if” questions to imagine the absolute worst occurring.
- **Shoulds:** You prescribe ironclad rules about how every person (including yourself) should behave. You feel angry when others break these rules and guilty or ashamed when you violate your own rules.
- **Emotional reasoning:** You believe whatever you are feeling to be true automatically and unconditionally. If you feel stupid and boring, then you conclude you are stupid and boring.

Since these thoughts often go unchallenged, a common intervention is to dispute the negative self-talk with questions such as: What is the evidence for this thought or belief? Am I confusing a thinking habit with a fact? Is this thought a habit I learned from my parents? Would I speak with a close family member or friend with the toxic language I use with myself? The next step is to replace the old thought with a more realistic one. Here is a more detailed example (from Amiram Elwork, *Stress Management for Lawyers: How to Increase Personal & Professional Satisfaction in the Law* (Vorkell Group, 2007)):

Self-Talk: "I am going to totally blow this trial!"

Disputing questions:

- How do I know this will happen before the trial even starts?
- How many times have I actually blown a trial before?
- How many times have I said that before, but it never happened?
- What is a possible truth? I need to prepare a little more because I think my opening statement could be better ...
- Once a real problem has been validated, ask:
  - How can I fix this?
  - What can I do about it right now?
  - Is there someone who can assist me?
  - How can I solve [prevent] this problem in the future?

## OTHER WAYS TO IMPROVE WELL-BEING

### Focus on Things You Can Control

Victor Frankl, M.D., a Nazi concentration camp survivor and the author of *Man's Search for Meaning*, said, "Everything can be taken from [an individual] but one thing: the last of the human freedoms—to choose one's attitude in any given set of circumstances, to choose one's own way." To put Dr. Frankl's statement another way, you often can't control what happens to you, but you can choose your response. There are countless things in your practice that you have little control over (e.g. your clients, evidence, opposing counsel, judges, juries, the law, etc.). The overall lesson I take from Dr. Frankl is to focus on things that you can control or at least manage: your thoughts, actions, words and attitude.

### Take Yourself Lightly and Your Work Seriously

Accept all parts of yourself, even the flawed parts. This is not to say that self-improvement is not a worthy goal, but be realistic about perfection. We can experience moments of perfection, so it is seductive, but not sustainable.

### Three Gratitudes

As lawyers, we are trained to look for potential problems, which is helpful on the job but can also negatively impact well-being. The three gratitudes exercise helps you train the brain to look for positive things in your life rather than scanning for what's wrong. For 21 consecutive days, take two minutes to think of three new things you are grateful for and then write them down. At the end of this period, you will have identified 63 things for which you are grateful. They can be big things like your health and family, or smaller things like a sunny day, a good piece of pizza or a friendly conversation with a stranger.

### Generosity

Richard Davidson, Ph.D., founder of the Center for Healthy Minds, says, "The best way to activate positive-emotion circuits in the brain is through generosity ... [T]here are systematic changes in the brain that are associated with generosity" (Kathy Gilsinan, "The Buddhist and the Neuroscientist", *The Atlantic* (4 July 2015)). Consider concrete ways that you can be generous to people and animals. For me, it is regularly volunteering at an animal shelter.

### Go Outside

To me, this is a no-brainer. If you need proof, one study (Gregory N. Bratman et al., "Nature Experience Reduces Rumination and Subgenual Prefrontal Cortex Activation" (2015) 112:28 PNAS 8567) concluded that walking in nature reduced participants' rumination on negative aspects of their lives, as evidenced by self-reports and changes in brain activity.

### Notice Exceptions to the Problem (or Learning from the Past and the Present)

When Los Angeles Angels slugger Mike Trout is in a batting slump, it is probably helpful for him to review recordings of his swing when he is hitting well and identify what he is doing differently. Your slump looks different, but the same lesson applies. If you are unhappy with your job or feeling stressed, ask yourself: When in the past have I enjoyed this or any job? Been more relaxed? Engaged in better self-care? Also focus on the present: pay attention to when things are going well with your job and well-being. In either case, whether it is past or present exceptions to the problem, note what's different and how you made it happen.

### Talk with Someone

Discussing concerns with someone is often helpful, even if the other person says little. Leverage available resources such as colleagues, mentors, LAP counsellors, friends, family members or religious advisors. This suggestion



should not be discounted. Getting something off your chest can be incredibly helpful whether you are problem solving or simply “inventing”.

### Micro Self-Care

Micro self-care is defined as quick, self-replenishing practices throughout the day that are simple, free and doable. In other words, don't wait for your next vacation. Incorporate small habits into your day and throughout the week. You can start the day with a grounding tool (e.g. listening to music on the way to work), practise an energizing tool after lunch (e.g. walking outside) and/or implement something relaxing at the end of the day to transition out of work (e.g. sit at a local lake for ten minutes). During a workshop, one lawyer said that to avoid bringing work issues home, he would imagine putting them in a duffle bag and tossing them by the side of the train tracks he crossed on the way home. He would “pick up the duffle bag” in the morning on the way back to work.

### Strategy for Keeping Your Commitments

At the end of one of our programs, a lawyer participant said, “This is all well and good, and I am pretty pumped up now, but I have been to these kinds of things for years, and yet I always seem to drift back into my old ways. How is any of this really going to make a lasting difference?” Fair point! Here are suggestions for keeping your commitment to improved well-being:

- Pick one key desired change.
- Make sure the goal is SMART (specific, measurable, attainable, relevant, and time bound). Example: I will listen to classical music during my commute to work for three of the five days (you can eventually increase the days, but it is important for you to experience success first).
- Write down the goal.
- Tell someone you trust.
- Ask that person to follow up with you.

So, to avoid the “drift back into **your** old ways”, write down one thing you can commit to now to improve your well-being and identify who are you going to tell. Having an accountability support person can be really effective.



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# A VIEW FROM THE CENTRE



By Mark Tweedy, C. Med., C. Arb.\*

## MEDIATION ADVOCACY

A mediation frequently takes place once litigation has been commenced. It is perhaps for this reason that counsel usually advocate at a mediation in the same way that they might if they were appearing before a court or tribunal. In my opinion, mediation calls for a different form of advocacy.

When counsel are appearing before a judge or tribunal, they are usually trying to persuade the trier of fact that the positions they are advancing on behalf of their client are correct, or that the positions being advanced by the other party are wrong. In my experience, cases seldom settle at a mediation because one party convinces the other that they are correct, or one party acknowledges that they are wrong. More often, cases settle because one party demonstrates to the other party the risks they face in proceeding further with the litigation.

In my view, counsel should adjust their approach at mediation accordingly. This includes, in particular, when developing a mediation strategy, drafting the mediation brief and preparing the client for the mediation. I will deal with each of these matters in turn.

### Developing a Mediation Strategy

Mediations benefit from the use of a strategy. A mediation strategy should focus on both process and content. Process is *how* we mediate, and content is *what* we mediate. Lawyers tend to be better at dealing with content than they are at dealing with process. This is likely because of their training. Skilled counsel will consider both process and content when determining the strategy that they will employ at the mediation.

Process includes:

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1. determining each party's needs, which in turn drive content;
2. style;
3. the myriad of steps that take place before the mediation itself; and
4. who will be in attendance at the mediation.

Needs involve much more than a plaintiff wanting to recover as much as possible, or a defendant wanting to pay as little as possible. A party's needs frequently include a desire to be acknowledged, a desire to be respected during the process, perceived long-term security and any number of other matters.

As indicated, needs drive content. I note that one of the skills of great counsel is the ability to obtain and organize information. Any efforts counsel make to determine what a party's needs are will assist them in determining what is important to the opposing party in a settlement, quite apart from monetary considerations.

Counsel should consider what their negotiating style is, or perhaps should be. A collaborative style yields better results, and resolves more issues, than a competitive approach:

Studies show that adversarial negotiators make about half as many deals as do more cooperative, problem-solving negotiators. And they get about half as much from the deals they do make. So if you are confrontational, expect about 25 percent of what's possible.<sup>1</sup>

Working in a collaborative way with opposing counsel does not mean ceasing to advocate vigorously for your client. It simply means that this is done in a different way.

Many steps in the mediation process take place before the mediation itself. Section 13 of British Columbia's *Notice to Mediate (General) Regulation*<sup>2</sup> (dealing with the pre-mediation conference) provides a list of matters that counsel should consider, and ask the mediator to assist with (if necessary), whether or not the mediation is being conducted pursuant to a notice to mediate.

The list is as follows:

- (a) whether the pleadings are final and complete;
- (b) the issues that are to be dealt with during the mediation process;
- (c) pre-mediation exchange of information;
- (d) exchange of documents;
- (e) obtaining and exchanging expert reports;
- (f) scheduling; and
- (g) time limits.

Finally, give consideration to who should be in attendance at the mediation, including friends and family, experts or independent advisors.

### **The Mediation Brief**

It is usual practice for the parties to exchange briefs before the mediation. A good mediation brief will explain the case to the client, opposing counsel, the other party and the mediator. A well-drafted mediation brief will enhance the prospects of settlement.

Here is what I think makes a good mediation brief:

#### **It talks about risk**

Cases settle because the parties recognize at least some risk in proceeding. Ongoing litigation costs also factor into many settlements, but I would include future expenditures on legal fees and disbursements as a component of risk. Regardless, very few mediation briefs that I see talk about risk, or advance arguments based on risk. Many mediation briefs that I see could pass for opening or closing submissions. A good mediation brief will both acknowledge and assess risk, and prompt discussion and consideration of risk.

#### **It is concise and tries to narrow the issues to those that really matter**

The mediation brief should not be clogged up with discussion about peripheral matters, or advance arguments that are not central to what the case is really about. As Albert Einstein said, "If you can't explain it simply, you don't understand it well enough." Settlements are more likely to be achieved if the parties focus on what is important, as opposed to dwelling on matters that are not.

#### **It tries to minimize or take off the table entirely issues that might otherwise impede settlement discussions**

A good example of this is where there is a claim for non-compensatory damages. I have never seen a defendant agree to pay them as part of a settlement, though I am sure that has occurred. In spite of this, such claims are often outlined in great detail in the mediation brief. If there is a risk of such damages being awarded, this should of course be mentioned. But a detailed analysis will seldom assist in driving a discussion about, and resolving, the main issues between the parties.

#### **It is as much written for the opposing party as it is for the opposing counsel**

My experience is that the parties to a mediation have usually read the other party's brief. If a brief is written in a form that a lay person can read and understand, it will be more effective, as it will prompt a discussion between opposing counsel and their client about the case being advanced against them.

### **It includes basic information about the case**

It is helpful to the mediator to include basic information about the status of the litigation and the details of any settlement discussions to date.

### **Preparing Your Client for Mediation**

Here are my thoughts about preparing your client for a mediation, based on my experience as a mediator and as counsel:

#### **The client should understand the brief you have prepared on their behalf**

Make sure that your client reads and understands the brief you have prepared on their behalf. In many cases, they will have insights into the dispute that you will not.

As well, use your client as a resource when drafting the brief. This is particularly important in any case where there is important technical evidence that your client may understand better than you do.

#### **The client should understand the opposing party's brief**

The client should also be provided with, and asked to review, the other party's brief. In my view, it is helpful for a party to hear, unvarnished, what the opposing party says about various issues in the case. This will also avoid the client hearing about an issue for the first time at the mediation itself.

#### **The client's expectations need to be realistic and flexible**

Before the mediation, the client should be encouraged to remain open to possibility. I think one of the jobs of counsel and the mediator is to get the best positions possible out of the parties. It is then up to the client, with counsel's assistance, to determine whether they wish to settle the case on that basis.

Many things go into determining what is an acceptable outcome to the case, and the amount of money involved is only one of them. The client will be open to possibility only if they do not have fixed expectations. Expectations are resentments waiting to happen, and never more so than at a mediation. If your client has unrealistic expectations, advise the mediator of this, and seek their assistance.

There are often a range of options available to satisfy the needs that underlie a party's position. This is particularly true in cases where the parties can resolve a case in ways that a court cannot. Such matters include, for example, estate litigation, shareholder proceedings, family business disputes and long-term disability insurance claims. If your client is dead set on resolving the dispute in a particular way, other options will not be considered, and an opportunity to resolve the case might be lost.



### **The client should be prepared to take an active role at the mediation**

It is helpful to prepare your client to answer questions, or to talk about their case. If there are people involved in decision making at the mediation who were not involved in the dispute, it will often be their first opportunity to meet and assess your client. If there are gaps in the evidence, your client may be called upon to fill them in.

As well, use the decision maker you have at the mediation as a resource at the mediation to explain why certain positions are being taken. In my experience, it is often more compelling to hear from the decision maker, as opposed to the lawyer.

### **The representative of the client in attendance at the mediation should have the necessary authority to settle the case**

If the representative of your client present at the mediation needs the authority of someone else to settle the case, make sure you know that before the mediation starts, and how to deal with it. If the issue is problematic, involve the mediator before the mediation. You should also involve the mediator if you think that there may be authority issues with the other party or parties to the mediation.

### **Summary**

In summary, the three main things that I would encourage counsel to do to advocate effectively at a mediation and resolve the case are as follows:

1. develop a mediation strategy, and specifically consider the needs that might underlie a party's stated position;
2. draft the mediation brief with a view to encouraging discussion regarding risk; and
3. counsel the client to remain open and flexible as to how the dispute might be resolved.

\* \* \*

The Vancouver International Arbitration Centre ("VanIAC") maintains a panel of qualified mediators. It is able to assist the parties to a dispute in selecting a mediator or appointing a mediator if the parties cannot agree on one. Visit <[vaniac.org](http://vaniac.org)> for further information, including VanIAC's Mediation Rules of Procedure.

### **ENDNOTES**

1. Stuart Diamond, *Getting More: How You Can Negotiate to Succeed in Work and Life* (Three Rivers Press, 2012) at 19.
2. BC Reg 4/2001.



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# ANNOUNCING THE 2022 *ADVOCATE* SHORT FICTION COMPETITION

## ELIGIBLE CONTRIBUTORS

Any person who is now, or has been, a member of the Law Society of British Columbia (including lawyers, judges and masters) or who is an articulated student. Contest judges and the “staff” of the *Advocate* are ineligible to contribute.

## ELIGIBLE FICTION

A fictional work, written in English, to a strict maximum of 2,500 words that deals, if only incidentally, with legal subject matter and contains at least two of the following phrases:

- (a) “The wasp is only half-dead, madam.”
- (b) “It’s a Tweet. The truth doesn’t matter.” (or “The truth doesn’t matter. It’s a Tweet.”)
- (c) “Well, I call it jazz.”

The contributor must be the author of the work, which must be entirely original and must not ever have been published or submitted for publication or consideration in a writing competition elsewhere.

## DEADLINE FOR SUBMISSIONS

The close of business on Friday, September 2, 2022. Submissions will not be returned, so authors should maintain copies of their work.

## FORMAT FOR SUBMISSIONS

Two double-spaced, typed manuscript copies, each with a separate cover sheet bearing the work’s title together with its author’s name, address, daytime telephone number and a word count. The author’s name should *not* appear anywhere on or in the manuscript itself, as all submissions will be judged anonymously, strictly on literary merit.

## ADDRESS FOR SUBMISSIONS

*Advocate* Short Fiction Competition  
c/o D. Michael Bain, Q.C., Editor  
The *Advocate*  
#1918 – 1030 West Georgia Street  
Vancouver, B.C. V6E 2Y3

## JUDGES

David Roberts, Q.C., Anne Giardini, Q.C., and Peter Roberts, Q.C. The decisions of the judges as to the literary merit of the contributions shall be final.

## PRIZES

First prize: \$400 gift certificate at a local book store and publication in the *Advocate*

Second prize: \$250 gift certificate at a local book store and possible publication in the *Advocate*

Third prize: \$100 gift certificate at Zefferelli's Spaghetti Joint and possible publication in the *Advocate*

Winning entries will be selected by, at the latest, February 17, 2023. Contest judges may award fewer than three prizes if, in their judgment, they consider it appropriate.

All submissions, including winning entries, will also be considered for possible publication by the Vancouver Bar Association or an independent publisher in a selection of "legal fictions" to be released at a later date.

## TRANSFER OF RIGHTS

In consideration of having their fiction reviewed for:

- (a) possible selection as winning entries;
- (b) possible publication in the *Advocate*; and
- (c) possible inclusion in a selection of submissions to be published in book form;

contributors agree upon submitting their work that the Vancouver Bar Association (publisher of the *Advocate*), or its licensee, shall have the sole and exclusive right, in Canada and for a period of 15 years, to print, publish and sell their work in such form or forms as the Vancouver Bar Association may in its discretion consider appropriate, such right to revert automatically to all contributors whose works of fiction are not selected as winning entries or for inclusion in the selection of submissions to be published.

Contributors further undertake, if required by the Vancouver Bar Association, to execute both a written assignment in order to confirm the transfer of rights described above to the Vancouver Bar Association and a waiver of the moral rights attached to their work, should their work be selected for publication in the *Advocate* as a winning entry or for inclusion in a selection of submissions to be published in book form. All proceeds or royalties, if any, from the sales of such a selection will be paid to the benefit of the Vancouver Bar Association, a non-profit organization.

# PETER A. ALLARD SCHOOL OF LAW FACULTY NEWS



The Peter A. Allard School of Law is home to four centres, specializing in business law, environmental law and natural resources, Asian legal studies, and feminist legal studies. Each centre provides opportunities for scholars and members of the legal profession to collaborate and share knowledge, ideas and practice experience. Below, we share an update on recent activities at the Centre for Business Law and the Centre for Law and the Environment, as well as current opportunities to get involved.

## CENTRE FOR BUSINESS LAW

Founded in 2006, the Centre for Business Law is a dynamic intellectual hub at the Peter A. Allard School of Law, advancing critical scholarship and the practice of business law in Canada and abroad. The centre is home to a community of scholars, professionals and students who actively contribute to the dialogue on business law. The centre is also home to two of the top J.D. business law experiential learning programs in the country.

Dr. Carol Liao was appointed director of the centre in August 2019. She is an associate professor at Allard Law and the UBC Sauder Distinguished Scholar of the Peter P. Dhillon Centre for Business Ethics at the UBC Sauder School of Business. Over the past two years, the centre has hosted or co-hosted over 70 events on a wide range of contemporary business topics, including cannabis law, Indigenous business, #MeToo and corporate culture, Canada-China legal relations and post-pandemic green recovery, to name a few. These events provide continuing legal education and opportunities for the Vancouver, national and international business law communities to collaborate and share knowledge. The centre's transition to online events at the start of the COVID-19 pandemic helped garner thousands of participants from around the world, with many recordings now available to the public online. This fall, the centre is continuing to offer

online events, as well as in-person events in adherence with COVID-19 safety protocols.

The Dean's Advisory Committee, composed of senior members of the business law community, provides strategic direction and advice to the centre. Mitchell Gropper, Q.C., was appointed chair of the committee in May 2020. Below are some highlights from our J.D. experiential, scholarly, community and executive learning programs.

### **Richards Buell Sutton LLP Business Law Clinic**

The centre supports excellence in learning through its J.D. programs, which offer rigorous practical legal training in areas of business law. The Business Law Clinic provides J.D. students with the opportunity to use their substantive understanding of business law in a clinical setting for the benefit of the public. Led by practitioners Ryan Black and Tyson Gratton, the clinic expands access to legal services for a range of small businesses and non-profit organizations in Metro Vancouver. To submit a client application, visit the clinic's website at [allard.ubc.ca/research/research-centres-and-programs/centre-business-law/business-law-clinic](http://allard.ubc.ca/research/research-centres-and-programs/centre-business-law/business-law-clinic).

### **Norton Rose Fulbright LLP Corporate Counsel Externship**

Students enrolled in the Corporate Counsel Externship are placed in the legal department of a business-oriented organization on a part-time basis for one academic term. Led by in-house counsel Erika Tse, the externship provides students with an opportunity to learn directly from experienced corporate counsel across Metro Vancouver in a supportive educational environment. Students apply concepts to practical legal and business matters in a particular industry while gaining a deeper understanding of professional ethics in practice. Organizations interested in supervising an upper-year J.D. student can visit the Corporate Counsel Externship section of the Allard Law website for more information: [allard.ubc.ca/research/research-centres-and-programs/centre-business-law/corporate-counsel-externship](http://allard.ubc.ca/research/research-centres-and-programs/centre-business-law/corporate-counsel-externship).

### **Anti-Corruption Law Program**

The centre provides specialized programs for scholars, professionals and students to come together to exchange ideas and connect. The Anti-Corruption Law Program ("ACLP"), led by Professor Emeritus Joseph Weiler and John Ritchie, is a working partnership between the Centre for Business Law, Transparency International Canada and the International Centre for Criminal Law Reform & Criminal Justice Policy. Originally funded by the Franklin Lew Innovation Fund in 2016, over the years the ACLP has been a community effort to establish collaborative anti-corruption education pro-



gramming and research across organizations. The ACLP has also launched Women in Anti-Corruption to bring together women in the field to promote the exchange of experiences and a deeper understanding of the impact of gender on corruption and vice versa.

### **Canada Climate Law Initiative**

The Canada Climate Law Initiative (“CCLI”) is a cooperative partnership between the law and business faculties of UBC, York University and Oxford University that examines the legal basis for corporate directors, officers and pension fiduciaries to manage and report on climate-related financial risks and opportunities, exploring the scope of fiduciary obligation. The CCLI is led by principal co-investigators Dr. Janis Sarra and Dr. Carol Liao of Allard Law, and Professor Cynthia Williams of Osgoode Hall. The CCLI’s Climate Governance Experts Program provides pro bono board presentations to share knowledge about best oversight practices in the path toward a net-zero carbon economy. Presentations can be booked at <ccli.ubc.ca>.

### **Mining Law and Sustainability Executive Program**

Dr. Carol Liao, together with the Associate Dean, Graduate and Professional Programs, developed and launched the Mining Law and Sustainability Program, the first executive learning program at Allard Law. This five-week online instructor-supported program provides mining and other professionals with knowledge of legal and regulatory instruments that govern sustainable practices throughout a mine’s lifecycle. The program presents a new framework for mining business decisions that goes beyond “business as usual” and considers human rights, Indigenous rights holders, climate change, and anti-corruption laws and regulations that advance sustainability in the mining industry. The first cohort of the program began in September 2021, with the next course to begin in early 2022. Check <extended learning.ubc.ca> for future registrations.

### **Stay in Touch**

Follow the centre on Twitter (@CBL\_AllardLaw), Facebook or LinkedIn and sign up for the Centre for Business Law newsletter on our website for the latest in events, workshops and programming.

## **CENTRE FOR LAW AND THE ENVIRONMENT**

The Centre for Law and the Environment at the Allard School of Law is an internationally recognized hub for creating and sharing knowledge and practices about the role of law in securing a healthy environment and sustainable society. The centre’s mission is to advance environmental law research by Allard Law faculty, students and visiting scholars; to enhance

environmental law education at Allard and beyond; and to promote action toward environmental justice and sustainability.

### Cutting-Edge Environmental Law Events

During the COVID-19 pandemic, the centre increased its reach and impact by holding virtual events that attracted people from around the world. One example is the centre's "No Fly Zone" virtual talks. This series is designed to bring in legal thinkers and practitioners from around the world to speak about cutting-edge environmental law issues, without generating travel-related greenhouse gas emissions. Recent "No Fly Zone" events include:

- March 2020: Rights of nature pioneer Mari Margil on the Rights of Nature movement
- October 2020: American human rights lawyer Steven Donziger on the Chevron–Ecuador oil contamination case
- October 2020: Canadian animal law pioneers Camille Labchuk and Victoria Shroff on access to justice for animals
- November 2020: Anishinaabe lawyer Lindsay Borrows on learning law from the land
- February 2021: Environmental health scholar Ingrid Waldron on environmental racism
- March 2021: International lawyer Natalie Oman on the *Notre Affaire à Tous* French climate change case
- September 2021: Australian lawyer David Barnden on the *Sharma* decision declaring a government duty of care to avoid climate change
- October 2021: German lawyer Roda Verheyen on the Constitutional Court's invalidation of the German climate change law
- October 2021: American lawyer Kelsey Skaggs on the Climate Defense Project
- November 2021: Scottish lawyer Mumta Ito on the global Rights of Nature campaign

Other recent public events include a keynote public talk in January 2021 by the UN Special Rapporteur on Human Rights and the Environment, Dr. David Boyd, who was introduced by environmental icon David Suzuki and federal Green Party leader Annamie Paul. The centre also hosted a series of webinars in November 2020 on climate change litigation by governments against fossil fuel companies, a three-day virtual conference in May 2021 on food law and policy, and a webinar in May 2021 on how to file citizen

submissions under the North American Agreement on Environmental Cooperation.

The centre's events are open to the public, and recordings are available on its website: <[allard.ubc.ca/cle](http://allard.ubc.ca/cle)>. Many are eligible for CPD credit. Most are free. As pandemic restrictions are relaxed, more of the centre's events will be held in person, usually at the law school. The centre will host an in-person training workshop in February 2021 for individuals interested in campaigning for protection of the legal rights and capacities of rivers, ecosystems and other non-human entities. In spring 2022, it is planning public screenings of the two-part documentary film *Necessity*, along with a Q&A session and a public talk by the director, Jan Haaken. More webinars and "No Fly Zone" virtual talks are also planned. Check the centre's website for details.

### **Respect for Non-Human Relations**

The goal of the centre's "Non-Human Relations" project is to provide research and public legal education for people interested in pursuing legal recognition of the capacities and rights of non-human relations like lakes, rivers, wild species and sacred places.

In collaboration with Indigenous and non-Indigenous organizations and with financial support from the Franklin Lew Innovation Fund, the centre is hosting a webinar series in which people involved in such campaigns share their experiences related to rivers and waterways (September 2021), supernatural beings and sacred places (October 2021) and non-human species (January 2022). The webinars will culminate in an in-person training workshop on law reform strategies at Allard Law in February 2022 led by rights of nature pioneer Mari Margil.

The centre is also producing a series of public legal education pamphlets. The first, planned for late 2021, surveys the legal form, content and implementation of "rights of nature" laws around the world. The second, planned for spring 2022, examines the synergies and tensions between "rights of nature" and Indigenous peoples' laws and rights.

### **Green Rights and Warrior Lawyers**

Another core project of the centre highlights the roles of courageous lawyers around the world who use law to advance the human right to a healthy environment and the rights of nature itself. This project brings these issues to life through the power of stories of individual environmental defenders around the world and the "warrior lawyers" who represent them in their pursuit of "green rights".

The project began as a collaboration between the centre and renowned Canadian environmental journalist and educator Silver Donald Cameron.

After Dr. Cameron's untimely passing in 2020, the centre continued the project. The main component of the project is an upper-year J.D. seminar taught by the centre's director, Professor Stepan Wood. The seminar carves out a unique niche in environmental law education by combining legal analysis and advocacy with journalistic techniques of documentary film, interviews, blogging and storytelling. Students write blog posts about "warrior lawyers" like Tony Oposa in the Philippines and Terri-Lynn Williams-Davidson in Haida Gwaii. They conduct research into cutting-edge issues of environmental rights, some of which is published in the centre's working paper series.

The longer-term goal of the Green Rights and Warrior Lawyers project is to develop a suite of educational resources for learners in a range of fields at various stages of lifelong learning from high school to retirement, in a variety of formats including fee-based continuing professional education programs similar to Allard's new Mining Law and Sustainability executive learning program, for-credit university courses, open online courses and open-access educational videos.

### **Training a New Generation**

A big part of the centre's mandate is helping train the next generation of environmental lawyers. Aside from the Green Rights and Warrior Lawyers seminar, it does this by offering Allard students experiential education opportunities with environmental law organizations; administering the J.D. specialization in environmental and natural resource law; helping organize the biennial Willms & Shier Environmental Law Moot, which will be held virtually in March 2022; supporting student-initiated environmental law projects; and appointing J.D. and graduate students as fellows of the centre.

### **Stay in Touch**

Follow the centre on Twitter (@CLE\_Allard) and Facebook to stay informed about upcoming events and opportunities.



# TRU LAW FACULTY NEWS



By Robert Diab\*

## TRU LAW TURNS TEN!

This fall, TRU Law celebrates its tenth anniversary. Looking back, we take pride in how much we have accomplished in reaching this milestone and are deeply gratified by the support of the bench and bar in helping us meet many of our goals.

The law school at Thompson Rivers University in Kamloops launched in 2011 with a faculty of five full-time professors and a class of 60 students. It now has 16 full-time faculty members, with more to be added in the coming year, and a full incoming class.

Our initial course offerings were modelled on the Calgary curriculum. Over the years, adjunct faculty members from Calgary, Kelowna, Vancouver and Vancouver Island helped us expand our selection of courses. Our most recent curriculum reforms ensure that, in addition to the core subjects such as property, criminal and constitutional law, we also have a mandatory second-year course called Truth and Rebuilding Canadian Indigenous Relations that answers one of the Truth and Reconciliation Commission's Calls to Action. Other innovative courses include Apps for Access to Justice, Sports Law and Community Lawyering.

In 2015, we moved into a beautiful, bright and modern \$20 million space created for the school, with funding from both TRU and the province. Almost every lecture room in the school features two-storey windows, with many offering a breathtaking, mountainside view of the Thompson Valley and the intersection of the Thompson Rivers below.

We have had the pleasure of hosting many of the country's most prominent judges and lawyers, including memorable visits by Chief Justice

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\* Robert Diab is an associate professor at TRU Law. His research is focused in the areas of criminal law, civil liberties and human rights.

McLachlin and Justices LeBel, Cromwell, Abella and Brown of the Supreme Court of Canada. The B.C. bench and bar have been exceptionally generous and supportive by sponsoring many scholarships and student awards, and attending the ceremonies in which they are given.

We have competed at the highest level in national moots, with TRU fielding teams in the Bowman Tax Moot, the Jessup International Law Moot, the MacIntyre Trial Advocacy Moot, the Wilson Moot and the Kawaskimhon Moot, along with the Hockey Arbitration Competition of Canada and the National Sports Law Negotiation Moot. Our teams have won top prizes in many of the moots in which they have competed, including a first-place award at the British Columbia Law Schools Competitive Moot. Here again, members of the B.C. bar have offered invaluable assistance as volunteer coaches and mentors.

In February 2016, a grant from the Law Foundation of BC helped us launch the TRU Community Legal Clinic. It began as a part-time clinic, with six law students participating in a Clinical Practice Course. Over the past five years, the clinic has become a full-time operation in an office in downtown Kamloops, with six employees and up to a dozen students participating. We have gone from opening 29 files in our first semester to opening roughly 150 new files per semester. In total, we have assisted almost 2,000 clients.

Since TRU Law opened in 2011, we have succeeded in helping our graduates launch careers in law and other fields. Every year, between ninety-four and ninety-nine per cent of students known to be seeking articles report securing them within nine months of graduation. Our students have landed positions in private practice, including with well-known regional, national and international law firms. They have obtained clerkships in trial and appellate courts across Canada, and have found jobs with government employers, non-profits and corporations.

We have had the pleasure of watching many of our earliest alumni develop in their careers, taking on larger files, opening their own firms, completing graduate degrees or serving in public office. Many graduates moved back to the larger cities from whence they came. But many have chosen to stay in Kamloops or ventured to more remote areas of British Columbia and Alberta.

Ten years on, we still feel like a new law school, filled with promise. And we hope to continue developing as rapidly in our next decade as we did in our first.

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# THE ATTORNEY GENERAL'S PAGE

By the Honourable David Eby, Q.C.\*

## IMPROVING ACCESS TO JUSTICE FOR INDIGENOUS PEOPLES

On September 30, people across Canada came together to mark the National Day for Truth and Reconciliation. This is a day to honour the lost children and survivors of residential schools, to learn more about the ongoing impact on Indigenous communities and to commit to meaningful reconciliation.

In British Columbia, this work was already underway. In November 2019, the province made history by introducing the *Declaration on the Rights of Indigenous Peoples Act* (the “*Declaration Act*”)—the first province or territory in Canada to do so.

The *Declaration Act* provides a path forward on reconciliation. It was developed in collaboration with Indigenous partners and puts in place a framework that will help to align British Columbia’s laws with the *United Nations Declaration on the Rights of Indigenous Peoples*.

Under the *Declaration Act*, each ministry in government has a responsibility to consider how new programs, services and legislation impact Indigenous communities, as we create a path forward that respects the rights of Indigenous peoples. For my ministry in particular, that means taking action to address the over-representation of Indigenous peoples in the justice system.

For this important work, we are making sure that the needs of Indigenous peoples are met by partnering with the BC First Nations Justice Council (“BCFNJC”). In March 2020, we signed the BC First Nations Justice Strategy. This strategy focuses on reducing the number of First Nations people who become involved with the criminal justice system, and improving the experience of those who do.

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\* The Honourable David Eby, Q.C., is British Columbia’s Attorney General and Minister Responsible for Housing.

Additionally, it aims to increase the number of First Nations people working within the justice system, and support First Nations to restore their justice systems and structures.

We're incorporating Indigenous justice models into the justice system with a focus on diverting people away from the justice system, including, whenever appropriate, through culturally appropriate and community-based alternatives to incarceration.

Since launching the strategy, we have opened two additional Indigenous Courts, in Williams Lake and Hazelton. This takes the total to eight in the province, with more on their way over the coming years. These courts are developed in partnership with the local First Nations communities.

The Indigenous Courts bring together elders, local service providers, the prosecution and the judiciary to provide a culturally appropriate approach to justice that focuses on addressing the underlying factors that brought an individual into the justice system in order to reduce recidivism.

While these courts work to direct people away from incarceration to restorative justice, we must also ensure that there are supports available through all stages of the justice system. That is why we have partnered with the BCFNJC to create three Indigenous Justice Centres, in Merritt, Prince George and Prince Rupert, as part of our strategy.

The centres offer Indigenous peoples access to a range of culturally relevant services, such as legal advice and representation for criminal and child protection matters, advocacy and referrals to other services to help them navigate the justice system. The centres are designed to provide holistic, wrap-around services, which include addictions and mental health services, counselling, housing services, employment services, and other health and wellness supports.

After only a year, we are already seeing the positive impact that these centres can have. They are helping people in rural and remote communities to access representation. They are also helping cases move forward with greater clarity and fewer negative outcomes.

That is a significant shift, and one that will have a lasting impact on the communities that are experiencing better outcomes for their community members who are interacting with the justice system.

But we know that many areas of the province still face significant barriers to accessing justice. That is why we recently partnered with the BCFNJC to launch a Virtual Indigenous Justice Centre. The centre offers the same services as the physical locations, but opens the door to people across the province, with lawyers and advice available via telephone, video or e-mail.

Throughout the pandemic, we have seen how valuable technology can be in maintaining access to justice and providing people across the province

access to the services and supports they need. This is particularly true for Indigenous peoples in northern and remote communities, as well as those that have been hit particularly hard by COVID-19.

By providing supports virtually, we can ensure that communities have more timely access to culturally safe supports and resources to help navigate the justice system, wherever they are in the province. As well as serving Indigenous peoples not living near one of three physical locations, it will provide critical justice services virtually to clients that are not able or wanting to access in-person services.

The strategy also brought another meaningful change over the last year with the shifting in responsibility for the delivery of Gladue services. These services ensure that Indigenous peoples have their particular circumstances considered by the courts, and encourage judges to focus on restorative justice, directing individuals to rehabilitation or community-based sentencing instead of incarceration where appropriate.

In April 2021, the management of this program transitioned from Legal Aid BC to the BCFNJC. Gladue services, previously available only to individuals who met specific financial criteria, are now available to all Indigenous accused. To provide greater awareness of Gladue services, the BCFNJC also recently launched *Gladue Principles* by Professor Benjamin Ralston. This book is available free of charge on the BCFNJC's website, alongside dedicated guides for counsel, judges and report writers to help them understand and implement Gladue principles in the courtroom.

I thank Legal Aid BC for its work and initiative to provide Gladue services in British Columbia for the last ten years, and look forward to working with the BCFNJC to ensure that Indigenous peoples have more timely access to culturally safe supports and resources to help them navigate the justice system wherever they are in the province.

The province has also committed to work with the Métis Nations BC Justice Council to deliver a dedicated Métis Justice Strategy. The development of two strategies, with overlap where appropriate, ensures that Nation-distinct approaches are recognized, representing the unique histories and needs of each group.

While these initiatives are a good step forward, we know there is much more work to do. We will continue to work closely with Indigenous leadership and their Nations to improve our justice system for Indigenous peoples. Reconciliation will take time and focused effort to address the continued impacts of colonialization and residential schools, but as a government we remain committed to doing the work and doing the work in a good way.



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INCREASING ACCESS  
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# THANK YOU

We, at APB, express our sincere gratitude to the 203 volunteer lawyers who participated in our 14th annual virtual legal advice-a-thon this past September. In two short weeks, you provided free legal advice to 402 low income people throughout BC. We also thank the event sponsors and everyone who donated funds or sponsored a participant in support of increasing access to justice for all British Columbians. With your help, we all raised a record-breaking **\$135,302**. Thank you!

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# NOS DISPARUS

## Wilf Wakely

Wilf Wakely, most commonly pronounced “Wirofu Waekuri” in his beloved and enchanting Japan, died peacefully in Tokyo on February 2, 2021 after a two-year battle with brain cancer.

The loss of this foremost advocate of closer and more harmonious Canada–Japan relations brought much sorrow and grief to literally countless people, on both sides of the Pacific and across the globe, whose lives, in one way or another, had been truly enriched by him in his many roles and endeavours. Wilf was at times a comedian, a businessman, a bureaucrat, a diplomat, a community leader and a mentor, and much has been said and published elsewhere on that score. His achievements of high office in commerce and government and as a member of numerous board and trade commissions included postings with the Department of External Affairs, appointment as British Columbia’s Trade and Investment Commissioner in Kobe, and appointment as president and chair of the Canadian Chamber of Commerce in Japan.

Wilf’s entrepreneurial skills were honed at an early age. As a grade 10 boy at St. George’s, he bought day-old pastries from a delicatessen shop on Dunbar St. on his way to school, and then at morning break he sold the pastries to the other boys. There would be quite a crowd around his locker. We understand that the headmaster was not impressed.

Wilfred Cowan Wakely was also a lawyer.

His appearance at UBC law school in 1977 as “a man with a plan” was like that of some exotic creature come among us. A YMCA exchange visit to Japan in 1965 when he was 15 years old had led, after his completion of high school in Vancouver, to a career as a highly popular commercial front-



man and comedian on Japanese television and ambassador positions at Expos in Osaka and Okinawa—rare antecedents indeed, even for the kaleidoscope of entrants to first-year law.

Wilf's charismatic allure allied with his natural cordiality and wonderful sense of humour soon found him many friends through the three years at law school. The firm bonds made with many of his classmates were so cherished and precious as to last until the very end, even until the final, eventually heartrending "Hey, bud" e-mail or phone call.

Wilf and Takako were married during the final year of law school, with delightful ceremonies in both Canada and Japan. Underlying all that followed was Wilf's dedication to his family: his devoted wife and their children, Tara and Conan, and their five grandchildren.

Following graduation and articling at what was then the firm of Ray Connell, Wilf was called to the B.C. bar in 1980. This was a time when the Japanese economy was performing magnificently and appeared ready to go into overdrive. Much Japanese investment money was seeking opportunities abroad. Many Japanese manufacturing companies were seeking foreign sources of supply—remember Quintette Coal? There seemed to be an endless horizon for legal work to service the needs of Japanese clients entering what was to them a foreign and relatively unknown legal environment. And Wilf Wakely would become the ideal lawyer to meet those needs—this, indeed, was his "plan". For those of us fortunate enough to witness the phenomenon, his capacity to put Japanese clients almost immediately at ease and have them gratefully repose in him their trust and confidence was a wonder to behold. His natural mien of intelligence, self-confidence and wit—which, with ever a twinkle in his eye, he never lost—and his effortless and eyebrow-raising fluency in the Kansai-ben dialect of Osaka combined with disarming effect.

Those were years of very hard work for a young lawyer with a young family. Yet, as a remarkable insight into his unique character, we note that somehow Wilf found time in the late evenings to retreat to his basement in his home in West Vancouver to build, to exacting maritime museum standards, a magnificent model of a North Atlantic salvage tug, the *Foundation Franklin*, whose deep-sea wartime missions from Halifax were the subject of Farley Mowat's *The Grey Seas Under*. Go figure. Not to mention that he obtained his private pilot qualifications to boot (in both Canada and Japan).

Wilf moved on to Davis and Company. In the mid-'80s, he accepted Department of External Affairs postings to Japan as press officer then legal officer, principally engaged in the redevelopment of the Canadian Embassy in Tokyo, and also dealing as liaison and translator for many visits by Canada's ambassadors to Japan. Here is Wilf's recollection of one such visit:



One of my responsibilities was to interpret for the ambassador. In my case, I was warned not to use my Osaka dialect, so I would try very hard to speak neutral Japanese. One ambassador was a big impressive man. At the end of every speech he would tell a joke—I never knew what it was going to be—and I found it really difficult to translate Canadian humour about Newfoundland or other nuances. One time, I really didn't know how to translate his joke, so I turned to the crowd and said in the thickest Osaka accent I could muster: "Ladies and gentleman, the ambassador has just said something incredibly funny so please laugh your heads off!" The audience exploded and clapped and the ambassador turned to me and said, "Great, we'll use that one next time!"

It was expected that Wilf's legal practice might yet be carried on in British Columbia. However, the collapse of Japan's asset price "bubble" in 1991 and the comparative retreat of Japanese interests to their native shores tilted the balance towards a career based in the land of the rising sun. Wilf and Takako with their two children moved to Japan in that year, and Wilf more or less underwent a "role reversal" of sorts. While representing British Columbia as Commissioner, Trade and Investment for the Kansai region (including Osaka, Kobe and Kyoto) in the '90s (including serving on recovery projects after the disastrous 1995 Kobe earthquake, which he and his family survived unscathed), Wilf's professional career now focused on assisting and orienting Canadian, U.S. and European individuals and companies to the complexities of Japan's legal and commercial systems and dealing with a multitude of cross-border issues. He was admitted to practise in Japan as a foreign law solicitor and became a member of the Tokyo Bar Association. He received the prestigious appointment to the Expert's Committee of the Japanese Investment Council. Wakely Foreign Law Office became associated with TMI Associates, one of Japan's top three law firms.

The eventual sale of their home in West Vancouver and the purchase of a delightful balconied apartment in central Tokyo, as well as a recreational property in Ryokan country, fully confirmed Japan as Wilf and Takako's permanent home.

Not all was affairs of state, international commerce and big business, or the glamour and conviviality of the Ginza izakayas or the Roppongi Hills Club. Wilf freely volunteered his legal services to the less fortunate and the needy, and he was a champion for those who were so unfortunate as to find themselves facing the truly uphill battle to retrieve children wrongfully abducted to Japan. He was a tireless and successful advocate of the rights of Canadians living abroad to vote in our federal elections.

Yet Wilf prided himself in his Canadian heritage (as well as his Irish heritage, becoming a dual citizen of Canada and Ireland in 1997). He was a frequent visitor to Canada and he maintained his Law Society of British Columbia membership throughout.

Wilf made his last visit to Canada in May 2019 to attend the 40th anniversary of the UBC Law Class of '79, to the surprise and unfeigned delight of all of his classmates. Despite the first signs of his inexorable decline, we found ourselves reacquainted with his bonhomie, wit and positive energy. We were reminded that our dear Wilf was a born comic and mimic, who was simply just such fun to be with. His fascinating range of facial expressions were able to convey delight, humour, irony, incredulity and, most rarely, scorn more than words. Unanimated, Wilf's visage in repose could seem as calm and as enigmatic as the Mona Lisa's—with glasses, of course!

In the sad vigil of his last years, Wilf was truly blessed by the support of Takako and their children and of his two sisters, Sue and Avis. Without him, they must now “soldier on”, as Wilf would say.

One of Wilf's last wishes was to have his ashes scattered in the waters of Howe Sound, and arrangements are underway to have that happen, when the pandemic's international travel restrictions permit.

If it be thus, Wilf, if it be thus. Kampai, our Japanese maple!

David Lunny

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## Elizabeth Campbell

On May 1, 2021, the BC Prosecution Service lost an esteemed colleague. Elizabeth Campbell passed away at the age of 53 after a long and hard-fought battle with cancer.

Liz grew up in Toronto and obtained a B.A. (honours) in 1991 and a master's degree in international relations in 1992, both from Queen's University. She moved west to attend law school and obtained her LL.B. from the University of Victoria in 1996. While at UVic, Liz participated in the co-op program. For one of her co-op terms, she moved to South Africa from May to August 1993 to volunteer for the Durban Legal Resources Centre (“LRC”) in overcrowded offices in downtown Durban. Liz went back to the LRC for six months in 1996, and again for a month in 1997.



Started by a progressive church group (Diakonia) with the support of Archbishop Hurley (a fierce opponent of apartheid), the centre housed many of the NGOs who helped oppressed communities. The LRC offered free services to the indigent and oppressed, dealing with cases of routine civil injustice as well as political unrest. The workload was crushing.

Liz was particularly proud of her work with the African residents of St. Lucia, who were not recognized as “residents” and therefore not allowed to vote, despite residing there 50 weeks a year. The racist council insisted that if they had a family living anywhere else, that was where they were “ordinarily resident”. Liz’s solid work helped to restore the rights and dignity of the whole African community, at a time when she was just months out of law school. She persisted despite intimidation, harassment and all the hotels suddenly having “no vacancy” when the LRC tried to make a reservation.

Liz also volunteered with NIM, the network of independent peace/violence monitors, set up to help communities where police stood by or even encouraged what the white-owned media dismissed as “black-on-black violence”. Liz, being Liz, signed up to work weekends alongside other volunteers from NGOs, churches, universities and anti-apartheid organizations. Wearing a blue hat and vest, unarmed and mostly without cell phones, she and the NIM monitors went to stand by at funerals, rallies and meetings. Their role was to monitor the conduct of the police and army, take evidence of human rights abuses and just “be there”. The presence of a reliable witness, and even better a lawyer, would deter violent and murderous actions by the police, the army and partisan activists. Liz’s legal experience was very useful in the field, as was her sense of humour. Liz knew how to interview witnesses and collect evidence (including collecting bullets to identify those that came from police-issued guns as opposed to AK-47s), and she was much sought after in the monitoring groups.

While volunteering as a monitor, Liz had the distinct honour of shaking Nelson Mandela’s hand, a fond memory she carried with her through the years. This was the context in which Liz got involved and stayed involved in South African politics for her entire life. For decades, she continued personal boycotts of companies that had engaged in commerce during the apartheid era (including one convenient but off-limits fast-food outlet). She was deeply troubled by more recent reports of so-called “corrective rape” directed against South African lesbians and supported a diverse set of local contacts as they fought against it.

Liz actively maintained her connections with human rights work in South Africa and her friendships with the motley crew of activists, human

rights lawyers and LRC staff. She also became an honorary godmother to one of their daughters, who became one of the most important people in Liz's life.

After graduating from law school, Liz clerked for the Supreme Court of British Columbia. She developed longstanding friendships with two of the justices she clerked for, one of whom officiated at the wedding ceremony for Liz and her spouse Karen. After clerking, Liz articulated and practised at Harper Grey Easton, working with, among others, now Chief Justice Hinkson and Terry Robertson, Q.C. After her passing, Chief Justice Hinkson shared that the first time Liz wore her gowns after she was called to the bar was in the Supreme Court of Canada, appearing with him on a file that she had worked on as an articulated student (*Smith v. Jones*). It speaks volumes about her skills that she would be asked to junior in the Supreme Court of Canada as a new call.

Liz joined the Criminal Justice Branch (as it was then called) in Region 2 (Vancouver) in July 1999. She worked as a trial prosecutor and bail Crown in the high-volume environment at 222 Main Street and later in the Supreme Court office at 865 Hornby. Liz joined Criminal Appeals and Special Prosecutions' Commercial Crime Section in March 2006.

Liz prosecuted with fairness, kindness and compassion. She was extremely patient and always had an open door, which was so important to the many new Crown counsel she mentored. Defence counsel also trusted her implicitly. For example, she was once invited by defence counsel to interview their client in cells in order to confirm the client's version of events, following which she stayed the charge.

As a trial Crown, Liz prosecuted countless significant cases in the B.C. Provincial Court and Supreme Court. She was co-counsel with Hank Reiner, Q.C., on both the trial and appeal in *R. v. Bonisteel*, a first degree murder prosecution for the deaths of two 14-year-old girls. She was also co-counsel with Trevor Shaw on *R. v. Singleton*, the \$500,000 theft and fraud prosecution of a former lawyer. The *Singleton* trial took place in Nelson over a period of six months. While Trevor would return to his family in Vancouver most weekends, Liz stayed to work. She eventually gained the sympathy of hotel staff, who gradually upgraded her to her final domain: the Egyptian-themed honeymoon suite, with fake hieroglyph wallpaper and a pyramid canopy over the bed. Thankfully, this surreal décor had no effect on her always-focused submissions.

Liz transitioned into Criminal Appeals in 2008, which was a perfect fit for someone with her exceptional analytical, writing and oral advocacy skills. Before cancer treatment forced her to take a leave, she had conduct of

countless appeals in the Court of Appeal for British Columbia and appeared twice as co-counsel in the Supreme Court of Canada.

Liz was a cornerstone of the Appeals Office and universally respected by her colleagues, defence counsel, and the staff and justices of the Court of Appeal for her intelligence, professionalism and judgment. She would take on files when everyone was too busy, volunteer for assignments that no one wanted and deal with administrative tasks for which there was no reward. She regularly championed hard workers and those who deserved an opportunity to take on more demanding files.

Liz was a founding member of the DNA Resource Counsel Group because of her vast knowledge of this developing science. Due to her interest in preventing wrongful convictions, she joined and was a committed member of the Post-Conviction Review Committee. She was also instrumental in assisting the Prosecution Support Unit with its constitutional litigation when it was first created.

At the 2015 Crown Counsel Conference, Liz, who was at that time the Criminal Appeals Sentence Admin Crown, was presented with a Recognition Award. This was more than apt because following the Supreme Court of Canada's decision in *R. v. Summers* (which altered the approach to calculating credit for pre-disposition custody), she had to deal with upwards of 100 sentence appeals that year. She did so in her usual way: efficiently and effectively and without a word of complaint.

In addition to Liz's court work, she was an active legal writer and educator. Liz co-authored the "Criminal Law" chapter in the CLEBC publication *Annual Review of Law & Practice* for many years. She was also a contributing author to the *Working Manual of Criminal Law* and co-authored papers for the National Criminal Law Program with Greg Fitch, Q.C. (now Justice Fitch of the Court of Appeal for British Columbia). For many years, Liz served on the executive of the CBABC's International Section and spoke at many Crown counsel conferences and continuing legal education events. She was also awarded the Young Justice Professionals Award by the International Society for the Reform of the Criminal Law for her work in South Africa.

Liz carried herself with poise, intelligence, humility and grace. She was a treasured friend and colleague to many within the BC Prosecution Service and to countless others in the judiciary, at the court registry and among the ranks of defence counsel. Collectively, they remember her deep voice and dry sense of humour; her unbounded kindness and compassion; and her judgment and unwavering commitment to justice, always wanting to do the right thing. She had a vast knowledge of criminal law, which she openly

shared with colleagues and defence counsel. Liz acted as a mentor to many (including defence counsel new to the Court of Appeal). She cared deeply about people. She remembered the names of your spouse, kids and dog, and if you told her a family member was ill, she would always follow up a few days later to ask how they were doing.

Liz was first diagnosed with breast cancer in June 2017. She endured gruelling courses of chemo and radiation but returned to work and more importantly to travel in the fall of 2018. Unfortunately, her cancer returned in the fall of 2019. She responded to that news with incredible fortitude and embraced every treatment, including experimental ones, to spend as much time as possible with Karen, with whom she shared a loving relationship, which was an inspiration to all who had the great joy of seeing them together. Each treatment worked for a time. When she was eventually told that her cancer was shrewdly eluding another new treatment, Liz, in classic fashion, quipped that if she had to go down, at least it would be to a “smart” cancer.

When Liz was first diagnosed, the Crown, defence bar and court registry rallied around her, and the support continued through the years. The Run for the Cure team “Appealing for a Cure” raised thousands of dollars for cancer research. In October 2020, Liz appeared in a promotional video for The Run for the Cure to encourage donations to support cancer research, which played a huge role in her treatment.

Above all, Liz was an exceptional person. She enjoyed an incredibly happy partnership with Karen for 14 years. Liz was a dedicated daughter and travelled regularly to Toronto to visit and care for her mother and father, especially in their final years. She was a great support to her brother Ron and a wonderful aunt to her niece Emma and nephew Scott in Ontario, as well as to a number of children of her close friends, who also looked to Liz as an aunt, a confidant and a role model. She was very proud of all of the young people in her life. Liz and Karen loved to travel and enjoyed trips with Liz's niece and nephew until travel became impossible because of the global pandemic and Liz's illness.

In one of her last conversations with a good friend, days before her untimely death, Liz said, “I'm glad I made an impact.” That was a classic Liz understatement—she had a massive impact on so many. She had a huge capacity for love and lived a life of transparency, unbridled will, and commitment to social, economic and criminal justice. Liz was a dear friend to many, and she inspired us in her quiet way to live a better life and value what we have. She will be terribly missed.

Lesley Ruzicka  
(with the assistance of many of Liz's friends)

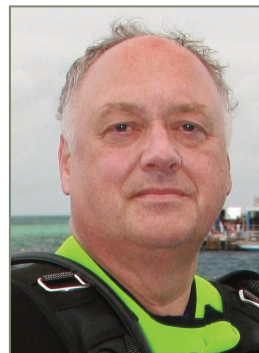


## Frederick William Hansford, Q.C.

On April 24, 2021, Fred Hansford, Q.C., age 67, slipped away wrapped in the arms of his beloved family: his wife of almost 45 years Laurel, sons Chris (Tanya) and Doug, daughter Alison (Mike), and grandchildren Brendan and Hannah. He leaves to mourn his mother Patricia, sister Ann (Frank), in-laws Sandy (Sally) and Jan (Eric), four nephews (Keith, Colin, Justin and David), niece Roseanne, two great-nephews and a great-niece. He was predeceased by his father, Frederick William Hansford.

Fred's family will miss his wisdom, guidance, generosity, wit and humour. He was forever humble about his life's accomplishments, talents and endeavours, preferring to let his empathy, generosity and kindness guide his relationships and life. He was passionate about his family, his extensive repertoire of pursuits, his profession and the wonder and beauty of life. In all his professional and private endeavours, Fred strove to excel, to live life to the fullest and to count and cherish his blessings—the most important being his wife and their three children. He will be profoundly missed, forever loved and always remembered.

Fred was born at Vancouver General Hospital on June 28, 1953 and attended Sir Sandford Fleming Annex Elementary and John Oliver Secondary School, where he excelled academically and learned to love, and become proficient at, football, soccer and judo. An unwise ultimatum issued by the school's football coach led to the team resigning *en masse* and morphing into the school's rugby team, a sport that became one of his life-long passions. He was a fan of the New Zealand All Blacks and loved the Canada Sevens in Vancouver. He also loved international soccer, closely following the World Cup. In his youth, he was a competitive swimmer for the Sunset Aquacats and, for a few years, the high school swim team. He was one of the key ensemble actors in a comedic high school production giving life and personality to the character "Eddie". Throughout high school, Fred sang baritone with several choirs and various choral ensembles under the direction of the late Teo Repel. A particular highlight was the choral trip the senior choir made to Llangollen, Wales to compete in a youth Eisteddfod. His love of languages in high school was apparent with his effortless command of Greek, Latin, French and Spanish. He enjoyed his "Reach for the Top" experience. Fred was a prodigious reader for his entire life and his lit-



erary choices spanned all literary genres, though science fiction was a particular favourite. He had a wicked sense of humour and loved a good Tom Lehrer or Monty Python song.

Fred graduated from the UBC Faculty of Law with outstanding academic honours and was awarded the silver medal. He articulated with Davis & Company and, after being called to the bar in May 1978, spent a summer with the Law Reform Commission of British Columbia. There he conducted preliminary research in the field of testate and intestate succession, astounding staff with an outpouring of detailed memoranda that basically outlined the commission's work over the next few years in wills and succession, before leaving for Wadham College at Oxford University. There, he received his bachelor of civil law (B.C.L.) degree, the English equivalent of a master of laws degree. Upon completing his degree, Fred returned to the Law Reform Commission of British Columbia, carrying out seminal work and developing policy for legislative action, perhaps most notably the work that eventually underpinned the *Wills, Estates and Succession Act*. He also displayed outstanding scholarship on topics as diverse as mistake of law, fraudulent conveyances and preferences, and illegal transactions, writing definitive studies on B.C. law in these areas. In 1981, Fred left the commission to pursue a barrister's practice with Wilson King in Prince George, enjoying success at both civil litigation and criminal law. Returning to Vancouver, Fred practised briefly with Fisher-Fleming Olsen before setting up his own firm: originally Hansford and Company, then Hansford Senyk.

Fred's practice was distinguished by a philosophy of being completely prepared, taking no file for granted. For contested matrimonial work, he developed what he referred to as the "Terror Package" in which all of the preliminary documents necessary to proceed to trial were included and, virtually from the inception of the file, delivered to opposing counsel, with comprehensive demands for disclosure and admissions. A firm receiving the Terror Package would frequently respond by duplicating the demands for disclosure, whereupon Fred could direct them to the appropriate appendices where all the required materials had already been provided. This approach, rather than drive matters to unnecessary litigation, almost always short-circuited the process and led to successful negotiations on behalf of his clients. Another of Fred's favourite neologisms, familiar to his colleagues, was a reference to a client having to rely on the "Brazilian Defence". This signified that a client's plight was dire and the not-guilty plea doomed to fail barring, as happened in one memorable case, the key prosecution witness miraculously being relocated to Brazil.

Even though he frequently referred to himself as "a simple valley practitioner", he delighted in litigation where the other side was represented by

“big-city firms” who all too often did not anticipate Fred’s massive preparedness and expertise in the ensuing court proceedings, particularly confounded by his mastery of the law of evidence (one of the subjects he read at Wadham College under the guidance of Sir Rupert Cross). As his reputation as a superbly skilled litigator grew, this led to frequent retainers, particularly by ICBC, for high-level complex appellate work, one example of which remains a leading case on costs (*Moses v. Kim*). During submissions in that case, one of the appeal justices took umbrage, considering Fred’s submissions as tantamount to the suggestion that their lordships did not quite understand the requirements of the *Negligence Act*. Rather than back down, as his lordship was expecting, Fred had to agree with his lordship that, sadly, this was pretty much the case and then explained in detail why.

In later years, Fred was a partner with the firm of Thome Jespersen and Hansford, and then, finally, Kaye Thome Toews & Hansford. In semi-retirement and facing declining health, he accepted an appointment to the BC Review Board, which reviews applications for release from treatment centres by those detained for crimes committed while under a mental disability.

As a member of the bar, Fred took seriously his responsibilities to mentor younger lawyers, which he delighted in, and in volunteering for the betterment of the profession. He was a treat to have a file with, with his eight-page letters and the world’s biggest barrister’s case. Fred served on a number of Law Society bodies, including the Practice Standards Committee, and he spent many hours as a practice advisor and mentor to other lawyers. He was generous with his time. In 1999, he was appointed Queen’s Counsel.

Fred was a masterful musician, beginning with learning to play the family Hammond organ with just a few formal lessons. To win the heart of a young lady, his wife Laurel (a bass and tenor drummer with the Burnaby Ladies Pipe Band), and to be welcomed by her family, he learned to play the great highland bagpipe. Her family was astounded at how quickly he made this instrument his own. As for the young lady, she was convinced he was the love of her life—and she of his—and that remained for almost 50 years. He loved playing the highland bagpipe and Scottish smallpipes, and his talents soon expanded to writing original tunes for bagpipe. His innate musical gifts provided many opportunities for international travel, for the forging of deep and longstanding friendships and for providing a channel for his musical creativity over the course of his life. He was a member of the Triumph Street Pipe Band, the Abbotsford Police Pipe Band, the Delta Police Pipe Band, the Prince George Regional Pipe Band, the Branch 83 Royal Canadian Legion Pipe Band, the Branch 88 Maple Ridge Legion Pipe Band, the Oxford Caledonian Pipes and Drums and finally as Pipe Major of the

Chilliwack and District Pipe Band. This leadership role was the piping accomplishment that brought Fred the most joy and sense of fulfillment, for it was under his direction, determination and initiative that the band was able to rise from being a small, community-based, recreational pipe band to one that could successfully compete on the international stage. Fred ultimately took the band to Glasgow, Scotland to compete in the World Pipe Band Championships, where it earned a tied fifth-place standing in the Grade Three Class (you have to be a piper to appreciate fully what a tremendous accomplishment this was). Fred continued to build and expand the band by establishing both a Grade Four band and a youth pipe band, for which he served as both a piping teacher and mentor. As a family, the Hansfords participated and played competitively in many local and regional highland games, with Fred on pipes, Laurel on tenor drum, sons Chris and Doug on snare drums and daughter Alison displaying her talents as a skilled highland dancer.

After semi-retiring from piping, Fred learned to play a resonator Deering banjo, becoming a proficient and entertaining player, with his main audience being his family and his faithful dog, Ben. Ben was Fred's constant and doting companion, who could always be found near Fred's side. No less loved and pampered were the two other family Bernese Mountain dogs, Jett and Jerry, who were equally spoiled and adored by Fred. Family trips to attend "Bernese Mountain dog meetups" in Metro Vancouver or Washington State brought many good and lighthearted memories into Fred's life. Fred also enjoyed fine wine, quaffing the odd glass or two of craft beer, preparing gourmet dishes for family and friends and hosting dinner parties liberally laced with scintillating discussions, humorous anecdotes and, Fred's favourite, Macallan Double Cask 18-year single malt Scotch whisky.

Fred's final literary accomplishment, *The Phoenix Drama*, begun as his COVID project, was completed ten days before his passing. It was the translation of a rare book titled *Drame de Phoenix*, published in 1926. The original book was a compilation of information related to the trial of the murderer of 11-year-old Madeleine Blancard, a half-sister of Fred's grandfather, Robert Louis Blancard. The original book was written in French with occasional passages in Creole, as was widely spoken in Mauritius in 1926, and appears to be the only surviving record of the trial of the murderer, Mr. Waterstone, which in itself was a *cause célèbre* in Mauritius. Fred's intent in writing his annotated translation was to make the history accessible to family members who do not speak French. This work, a gift left by Fred for his family, was a richly personal journey, and one that in his words "became something more. It brought to life my great-grandparents, great-aunts, great-uncles and

cousins, both Blancards and Boyer de la Girodays, all so distant in time, space, and culture.”

In the coming year, perhaps when time and opportunity prevail, Fred's family are considering a private celebration of his life with the family's version of the Hawaiian “paddle out” ceremony, which will allow the spreading of his ashes in his “most happy place”: Maui, Hawaii. It was Fred's desire that he would forever scuba dive in the island's warm waters and that the serenity and joy Fred found exploring these tropical waters, as a scuba diver, be his for eternity.

Ann Eichel, Mark Hargrave, Alan Bevan and Thomas G. Anderson, Q.C.

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## Robert Watson

Bob Watson was a loving husband, a caring father, an indulgent grandfather, a brilliant lawyer, the best of partners, and although he would never admit it, a mediocre golfer. On June 4, 2021, Bob lost his two-year battle with cancer. As with all he did, he fought the good fight until the end. He is fondly remembered and missed by all who had the good fortune to have him in their lives.



Bob was born and raised in Nanaimo. He attended UBC and wanted to become a Canadian diplomat. He travelled the world in 1968. Unfortunately, his hoped diplomatic career was scuttled by his French. So, he went to law school and did very well indeed.

He graduated from UBC law school in 1974 and articulated and worked as an associate at Owen Bird until 1979. He joined Sutton Braidwood as an associate in 1979 and became a partner in 1981.

Early in Bob's career, he was driven to succeed at the practice of law. He specialized in tax shelter real estate developments. He had a booming practice. In June 1983, Bob had a life-changing experience. He attended a meeting in Dallas, Texas on behalf of a client. One of his colleagues at the meeting wanted to continue discussions and asked Bob to accompany him on a flight back to Toronto. Bob declined. The plane made an emergency

landing in Cincinnati, Ohio after it was filled with smoke because of a fire in the lavatory. Twenty-three passengers, including Bob's colleague, were killed. Thereafter, Bob always knew there was more to life than work, and he lived his life accordingly, always making time in his busy schedule to spend time with his family.

On November 1, 1984, Bob, Rick Goepel and Tim Maledy, together with a newly called associate, Nancy Wilhelm-Morden (now Q.C.), opened the doors of Watson Goepel Maledy. The firm had come together quickly. Less than a month earlier, Bob, Rick and Tim had gone to lunch at the original Don Francesco on Richards Street. Five hours and too much wine later, they had decided to start a law firm. They were all young and naive and had little understanding of the challenges they faced. Thirty-seven years later, Watson Goepel continues to thrive. Without Bob's leadership and steady hand, it never would have survived.

By the late 1980s, Bob's practice had imploded. Changes to the *Income Tax Act* had decimated tax shelters. Bob's response was not to mope. It was not his style. Though he had not conducted a trial in years, he got himself retained to take on a major accounting firm in a professional negligence action arising out of advice given to a group of individuals to invest in a tax shelter. After 42 days of discovery and 47 days of trial, Bob's clients were awarded a substantial sum: *Haida Inn Partnership v. Touche Ross*, [1989] B.C.J. No. 1186 (S.C.).

By the time the case was over, Bob had rebuilt his solicitor practice. He put away his gowns and did not return to a courtroom for more than 20 years.

Bob was the best partner you could ask for. Whatever the issue, he could find a solution. If you had a client with a problem, you knew with great confidence you could refer the client to Bob and the client would get good and valued advice and be satisfied with the result. For example, two weeks after the firm opened its doors, Rick received a call from a client in Ontario for whom he had previously done some work. The client told Rick they were thinking of buying ICBC's General Insurance division and asked if he knew anything about buying an insurance company. Although he knew absolutely nothing about buying an insurance company, Rick assured the client the new firm could assist because he just knew Bob would be able to handle it. Two weeks later, the clients came to Vancouver. Bob and Rick met them for dinner. At the dinner, Bob asked if he might take some notes. The dinner concluded at about 11:00. Bob headed back to the office. At 9:00 the next morning, he presented the client with a proposed letter of intent. Within 48 hours, an agreement in principle had been reached, and Bob



spent the next two months doing all that was needed to close the sale. The newly purchased company became the foundation of the firm's insurance practice.

Bob was a traditional solicitor. He was the trusted advisor to scores of individual clients who looked to him for guidance. His clients cherished his counsel and strategic vision. They knew Bob would give them the straight goods. He would never sugarcoat his advice, and sometimes his advice would not be what the client wanted to hear. That never bothered Bob. He believed his role was to give the client the best advice possible, and that is what he always strived to do.

Bob was the managing partner at Watson Goepel for more than 20 years. He was pivotal in the firm's growth, looking after the firm's needs while building and maintaining his own successful corporate commercial practice. He knew the firm's survival depended on the greater good, and always strove for that end even if it might not be in his own immediate interest. He patiently mentored young lawyers and staff, always stressing the need to exceed the client's expectation.

Bob was enticed away from Watson Goepel and became in-house counsel for Sam Belzberg. He guided Mr. Belzberg's vast and far-flung operations for some time. As he was crossing 65 years of age, Bob decided to retire and indulge in travel, continued sports and grandchildren.

Bob loved tennis. In fact, Bob met Karen on a tennis court. Karen and Bob travelled to Roland-Garros for the French Open and to Flushing Meadows for the U.S. Open. There were other European adventures.

Bob was the consummate good host. Almost every weekend, it seemed that Karen and Bob were entertaining friends and family. He was a charming host who poured exotic Scotches and vintage wines to accompany his exquisitely barbecued filet mignons.

Retirement begat a second home in Palm Springs. Golf became a passion. In fact, Bob's grandson, Ben, came under his golf tutelage around age eight and is now quite a golfer.

Regrettably, cancer caught Bob. After gruelling operations, radiation and chemotherapy, it seemed that Bob had beaten cancer. The golf scores improved. New clubs and a new car were purchased. He shot 86 on Saturday, March 6, 2021, his last round. Then, cancer returned. Almost three months from the day of his last round of golf, cancer felled him.

Bob is survived by his loving wife, Karen; his children, Andrea, Hayley, Sam and Lauren; and his four grandchildren, Ben, Lily, Mila and Ivy. This was a life well lived, and he is greatly missed.

The Honourable Justice Richard Goepel and Ravi R. Hira, Q.C.

## Leslie Hall Pinder



Leslie Hall Pinder was a poet. When we think of a poet, we think of one who looks deep into the story to find its essence and then unearths the metaphors, capturing the elusive with a quality of beauty and an intensity of words that reveals, transforms and tells a new story. With her dry wit, she loved a good conversation with a very good glass of wine, her mind travelling with you to all sorts of places.

Leslie did not think in straight lines. When she encountered the vertical lines on legal foolscap, or when she added a line to dissect her notepad (which she always did), one would see art happening. On the left side were the legal notes recording what was said; on the right were literary ideas, images, a character, a metaphor, a line in a poem. On the right she imagined and reimagined meanings of what was being said and how that meaning could be conveyed and translated to judges, to government, to corporations, transforming legal fictions like that of the “reasonable man”.

Leslie's first foray into the courtroom was as a court reporter. By day she listened and recorded the stories of criminals and victims—what was said by the police, the lawyers and the judges. By night she wrote fiction. The courtroom would feed her writing. Her big curiosity took her, at lunch, to the prosecutor's library looking up cases and studying the origin of Latin phrases, then it took her to law school. *Sine qua non*.

In the early 1970s, almost half of Leslie's first-year law class were women. Leslie contributed to a culture of female discourse: feminism in the law and the legal profession. She was a member of a collective who founded the first women's legal clinic: women law students providing legal advice to women clients. The injustices she heard and felt got her going. She never looked back. Leslie was fascinated with how the Court of Equity (the Chancellor's Court) arose. Equity found ways to do justice, casting aside the rigid rules of the common law. Equity was the feminine; law was the masculine.

Leslie articulated at a large downtown law firm, training as its first woman litigator. Then she walked through a door. The event was a firm dinner at the Vancouver Club, an exclusive men's club. On her way over to dinner, one of the junior associates said that he would go in through the servants' entrance with her. Although she didn't want to make a fuss, being a brand-new lawyer and all, that was not going to happen. After all the male lawyers

had gone through the front door, she climbed the steep set of granite stairs, pulled open the heavy steel door and walked right on through. This act was a visibility issue and foreshadowed her work in law—charging forward because it was the right thing to do.

Leslie was hired by the late Grand Chief George Manuel to serve as in-house counsel with the Union of BC Indian Chiefs (“UBCIC”). Mary Lou Andrew, an elder from the Seabird Island Reserve, was the head of the Legal Department. Mary Lou taught the art of listening, and Leslie absorbed the teachings. Each person, each community had its own story to tell, and each nation its own language, customs, traditions, and laws, culture and spirit steeped in their homelands. Leslie listened with the ear of her heart and fulfilled her twin desires as a writer and a lawyer. She was brilliant in both.

Leslie, with her partners Louise Mandell and Clarine Ostrove, established the then all-women law firm Mandell Pinder. Out of their small Gastown offices, Leslie encountered another formidable door: the rights of Indigenous people denied, their voices silenced, their territories considered “terra nullius”. One question dominated: How did the government get the land that Indigenous people occupied, without conquering them and without paying them? She would find the words to convince judges that there had been a mistake and we had to fix it. She took control of the story by revealing what was underneath. She walked into the many courtrooms, her literary mind alive in her legal work, and case by case, she shaped the law to pry that door open, wide open. Fiduciary obligations, the honour of the Crown and reconciliation are now central themes in the law. Equity was the scaffolding for every case.

The 1980s were heady days for litigation to protect the rights of Indigenous people. Indigenous voices were excluded from forums of debate about the proposed patriation of the Canadian constitution. UBCIC instructed their lawyers to launch a court case in the British courts claiming that the Dominion of Canada included the Indigenous nations who were not consulted and did not consent to the Canada bill. Hundreds of historical documents were unearthed, and Privy Council cases were closely analyzed. These essential papers to support the chiefs’ case were transported around London in Leslie’s orange leather briefcase, affectionately known as Oscar. Leslie had been out of law school for less than two years.

No brief was too big or too small.

Canada’s national railway, CN, proposed to twin its existing track along the Fraser and Thompson Rivers. The first track was laid down in the early 1900s through the homelands of the Secwepemc, Nlaka’pamux and Sto:lo peoples. The tracks came through without warning, without discussion, as

though the people were not at home, severing communities, destroying villages, cutting off access to fisheries. Now 60 years later, CN was running trains with riprap, contrary to its promise to hold off. Leslie's fury set in. She could not, would not stand by in the face of callous injustice. She stood up with the chiefs, blocking the trains, and then in court Leslie gave voice to the people's relationship to their lands and fisheries. If the second track went down, it would irreparably harm their way of life. Stunningly, CN spoke of themselves as being "next to God" in power and in importance. On August 19, 1985, MacDonald J. issued an injunction to restrain CN from construction. The injunction stands today. The court heard the people's story: "We cannot recount with much pride the treatment accorded to the native people of this country." Some five years later, these words were adopted by the Supreme Court of Canada and undergirded the development of Aboriginal rights and title in the constitution.

In the area of jurisdiction over taxation, the law was against First Nations. Leslie, never taking "no" for an answer, worked to secure amendments to the *Indian Act*. The changes clarified that First Nations and not the province would now have the jurisdiction to tax non-band member occupiers of reserve lands. The Supreme Court of Canada then expressly recognized that this taxation power was necessary for First Nation self-government. Leslie then assisted the chiefs to establish a first in the commonwealth: an Aboriginal institution, the First Nations Tax Commission.

Case by case. Issue by issue. Two sides of the page. The verbatim stories, the facts on one side. The meanings, the linkages, the relationships, the reflections on the other. Leslie knew about bearing witness, listening, asking questions, learning about who her clients were and what their lives were like, getting underneath their reality to make their truths understandable and meaningful to the courts. Leslie's courageous curiosity, her willingness to work intuitively and her legal smarts were all drivers in her advocacy being so inspiring, ground-breaking and effective.

Leslie was a published author of four novels,<sup>1</sup> poems, essays, short stories and an opera-libretto. She went from the lockdown of the trial decision in the *Delgamuukw* case to writing *The Carriers of No: After the Land Claims Trial*, an essay studied in law classes across the country. This is a powerful, commanding example of Leslie getting underneath, at the belly of the judgment, seeing clearly and speaking out forcefully, giving voice to a paradigm that needed to shift.

There was no map. But gradually there was a transformation—a different history was forged, redesigning power between the Crown and Indigenous people. Leslie participated in changing the dominant metaphor. Spurred on

by Leslie's literary mind, by her poetry and metaphors, she illuminated the wrongs and showed a path for the law to intervene to correct the transgressions of the past. This was Leslie's creative genius in the courtroom.

Leslie's interest in metaphor extended well beyond the courtroom to the heat of the bullring, the passion of the opera, the archetypes of the stage and an extensive collection of wide-brimmed hats. Leslie blasted through her life, a truth seeker and truth teller with a fierce sense of justice and a raw willingness to embrace everything. She journeyed assiduously to find her great love, Catherine. Leslie did not shy away from a challenge. She welcomed the coming-into-play of the spiritual, the magical, the mysterious. Nature whispered to her one day when she was visiting Hardy Island, and she wanted to listen. She built her house, off the grid where the forces of nature required her to learn how to capture the sun and rain, how to captain a boat, how to rise above isolation.

When Leslie was eight years old, her 36-year-old father died suddenly from a massive heart attack. Leslie described the experience of his death as an "inexplicable, catastrophic earthquake which disappears your love." From the fire of this defining event in her young life, Leslie found the words to describe our great loss at her sudden passing.

By Clarine Ostrove and Louise Mandell, Q.C.

#### ENDNOTE

1. Selected Publications: *Under the House* (Random House, 1987); *On Double Tracks* (Bloomsbury Publishing PLC, 1990); *Bring Me One of Everything* (Grey Swan Press, 2012); *The Indulgence* (Tellwell Talent, 2019); *The Carriers of No: After the Land Claims Trial* (Lazara Press, 1991); "To the Fourth

Wall" in Max Wyman, ed, *Vancouver Forum I: Old Powers, New Forces* (Douglas & McIntyre, 1992); 35 *Stones* (Lazara Press, 1982); "Bring Me One of Everything: Selected Writings of Leslie Hall Pinder" (2007) 31 *Legal Studies Forum* 1033.



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# NEW JUDGES

## The Honourable Justice Lauren Blake

Lauren Blake comes well equipped for judging. The Blake family is endowed with serious brainpower. Her father Ian is a distinguished professor of electrical engineering and a mathematician. One of his books is *An Introduction to Applied Probability*. He must have known his daughter would one day be balancing probabilities on a daily basis. Elizabeth, her mother, was a computer scientist in the 1960s, working for the jet propulsion lab in Pasadena, California, and again in the 1980s working with the project team at the University of Waterloo that developed software to computerize the *Oxford English Dictionary*. That project ultimately led to the establishment of Open Text Corporation. Her brother Michael is Professor of Philosophy, Public Policy, and Governance at the University of Washington.

Lauren was born and raised in Waterloo, Ontario. Thanks to her father spending his sabbaticals pursuing his academic interests, she spent her grade 1 year in Yorktown Heights, New York, when her father spent time at the IBM Research Center. Grade 10 was in La Jolla, California, where her father worked at M/A-COM Linkabit, and as a 13-year-old she spent the summer in Switzerland while her father was working at the IBM Zurich Research Lab in Rüschlikon.

Lauren was active in student affairs: she was elected to the student council both in high school and at the University of Toronto. She worked as a tour guide, a waitress, a human resources assistant and in a legal aid clinic during her time as an undergraduate. She graduated with an honours history degree from the University of Toronto in 1991 and completed her law degree at UBC in 1994, having started out at UVic.

After graduating, Lauren spent a year as a law clerk at the B.C. Supreme Court and then completed her articles at Davis & Company (now DLA Piper



(Canada) LLP). She was called to the bar of British Columbia in 1996. After her call to the bar, she practised as a litigator. She worked on estate litigation, professional malpractice, commercial disputes and family cases. Her daughter Emily was born in June 1998, followed by Michaela in November 1999 and her son Josh in January 2002. Busy times. In 1999, she moved in-house with CIBC Trust until the bank decided in 2000 to get out of the trust administration business, at which point she went to work for the Planned Lifetime Advocacy Council, now known as PLAN (Planned Lifetime Advocacy Network), a non-profit organization that helps families secure the future for loved ones with disabilities. She was lured back to Davis & Co. in 2002 to work with Peter Bogardus and Mary Hamilton in estate planning.

In 2004, she was struck by a life-threatening disease: necrotizing fasciitis. After several days on life support in the ICU at St. Paul's Hospital, she recovered. The emergency surgery that saved her life left her with excruciating pain in her shoulder, however, and she was unable to practise law because of the powerful painkillers she had to take. Despite less than encouraging advice from several doctors, she persevered in her search for a solution. She had a spinal cord stimulator implanted at St. Paul's Hospital, but that did not work. She ultimately consulted with a local surgeon, who carried out shoulder decompression surgery in late 2010 that, along with experimental drug therapy, removed the source of the pain.

This episode lasted almost seven years. She then advised the Law Society that she was ready to return to the practice of law, just in time to avoid having to article all over again. Back to Davis she went, although not to resume her estate planning practice. She went back to litigation. She had been out of the litigation game for at least ten years, and there were some skeptics—could she pick up where she left off? Litigators at Davis were understandably nervous about this. As was she. They need not have been. You would have never known she had missed any time. The tenacity and determination she displayed during her recovery from necrotizing fasciitis continued into her practice. Anyone who thought she might be easy to push around was going to be disappointed. Anyone hoping she might not be paying attention was in for a shock.

Her return was a complete triumph and, typical of litigators, many in the department claimed credit for her successful return to the firm. She resumed her previous practice: estate and trust litigation, professional malpractice, family law and commercial disputes. She quickly became an important mentor for her colleagues, always available to provide the benefit of her experience and her wisdom. In 2017, she moved to Legacy Tax + Trust Lawyers, where she practised until her appointment on April 27, 2021.

At the time she was appointed to the bench, she was named in Best Lawyers in Canada for Trusts and Estates and for Corporate and Commercial Litigation. She has served as chair of the Wills and Trusts Section of the CBABC. She has written and presented extensively on topics related to trusts and estates and coordinated the Estate Litigation Basics course for CLEBC.

After spending years volunteering for her children's schools and sports teams, she then served as a director of the Central City Foundation for several years, an organization that has existed for over 100 years to improve the lives of people living in Vancouver's Downtown Eastside. The foundation's capital is invested in social real estate to provide low-income housing, as well as supporting community organizations (in addition to their extensive grant program).

These days, Lauren's three children are all pursuing post-secondary education. The four of them have formed a strong blended family with her husband, Dave, and his two children. Whenever Lauren needs to find her centre, she seeks out water, be it a pool, a lake or an ocean. She finds calm in kayaking, canoeing, swimming across a lake or simply walking on a beach with the surf. A competitive swimmer in high school, she enjoys bike riding and playing tennis and she has recently started playing golf. Reading is another of her long-term pleasures. She is a skillful classical pianist but is too shy to perform for others.

Her greatest, although by no means her only, talent is making and keeping friends—lots of friends, some of them from her high school days. As her husband put it, "She has an interest in people, and is a very good listener. Friends from all walks of life are drawn to her for her calm counsel. I have observed her forge new friendships in a matter of minutes. She is genuine and she is comfortable in her own skin. People are drawn to her."

Steven I. Platt is an eminent American judge, now retired. On his website, "A Pursuit of Justice", he discusses judicial temperament. He writes:

This character trait encompasses both the ability to apply the law to the facts and to understand how a judicial decision will affect the human beings appearing before the court. It is the ability to communicate with counsel, jurors, witnesses and parties calmly and courteously, as well as the willingness to listen to and consider what is said on all sides of a debatable proposition.

Platt identifies the following qualities that an effective judge must possess: patience, open-mindedness, courtesy, tact, courage, punctuality, firmness, understanding, compassion, humility and common sense.

This could be a checklist of what you need to be an effective judge. Lauren ticks all the boxes. She will be an excellent judge.

## The Honourable Judge Oliver Fleck

Working with Oliver Fleck at the Crown Counsel office was always a pleasure. He was the calm in the storm, the voice of reason and the quiet decision maker. He was wise and reasonable in the face of drama and strong advocacy. He possesses all the attributes a judge should possess.

Oliver came to the Crown Counsel office after an interesting beginning. He grew up in North Vancouver and completed law school in Seattle, Washington. He then went to London, U.K. and completed his master's of law in international law (with merit) in 2008 at the University of London.

Oliver went on to work for the Department of International Affairs in Geneva as a diplomat, legal officer and trade negotiator to the United Nations and World Trade Organization. He also worked in the Naval Reserve, specializing in surface warfare operations. He balanced that work with volunteering in community law offices and with sports teams as a coach.

In 2010, Oliver married the love of his life, Carolynn. Anyone who has met Carolynn knows she is a wonderful partner for Oliver, a thoughtful and decisive woman. As such, she chose Oliver as a "prospect" on their first date, a golf game she arranged. She did this as a test of who Oliver was and watched carefully as they played their round. How would he respond to losing a ball in the forest or to managing an amazing putt? Would he be temperamental or an overly competitive partner in their golf game? As Carolynn described it, Oliver passed with flying colours—no temper tantrums, no crowing over a successful hole. He was a calm, methodical, polite player and a joy to be around. Carolynn's advice is if you want to know about a person, take them golfing. It certainly has proved successful for them.

Oliver took on Crown counsel work in 2012, heading to Fort St. John despite having never been there before. Carolynn had the grace to go along, transferring in her work to support him. Oliver describes meeting the then-Regional Crown, Oleh Kuzma, Q.C., and being impressed with Oleh's passion for Crown work and decisive nature. He knew working in the North as a criminal lawyer (though he had no criminal experience at that point) was what he wanted to do. He began as a trial lawyer in Fort St. John, conducting many serious prosecutions, and became the Administrative Crown Counsel in 2014.



Carolynn describes the move to Fort St. John as a great move for them. The community and Crown Counsel office were very welcoming, and they managed to find room in their new house for the over 1,000 sports jerseys Oliver had collected over the years! Oliver is a huge sports fan, supporting all the B.C. teams and of course the Seahawks. He has a jersey from every favourite team, and they take up most of the room in the family closet.

As a Crown in the Peace Region, Oliver quickly gained a reputation as a steady, talented prosecutor and a trusted mentor and friend. He supported other Crown, mentored them kindly and “brought along” several very junior Crown in a part of the region where it can be very difficult to retain lawyers and that has a unique set of challenges.

Although he was a stranger to the North when he started there, he quickly settled in and grew to love it. As he has said on many occasions, the “city” (Lower Mainland) has a lot to offer, but it also suffers the daily headaches of heavy traffic, too many people and terrible snow removal. In the North, you have the same quality of work as a lawyer (crime is crime after all), but you also have close relationships with those you work with, a very short commute to the office and good snow removal. The ability to get to the office without a shattering headache or being stiff from sitting in the car for an hour was a real attraction to Oliver. The close relationships you form with others in the small office and courthouses where you work was an added bonus that he loved.

Oliver also represented the North for many years on the board of directors of the British Columbia Law Institute and as a member of Provincial Council and the National Council of the CBA. He volunteered many hours of his free time to these positions.

Oliver became a Deputy Regional Crown Counsel in 2017. Oliver led quietly and with the person involved in his decision in mind. He made all decisions by trying to know all of the facts and also trying to understand the behaviours of the person that would be impacted by his decision and what the result of his decision would be. He made decisions with compassion and a strong sense of community interest and public safety.

Oliver was a very supportive colleague. He listened carefully, discussed quietly and respectfully, and was a strong teammate. Differences of opinion were quickly forgotten and a useful discussion was held when Oliver was in the room.

Oliver has been on the Provincial Court bench for a year, sitting in the Peace Region. He has brought to the bench his steadying approach to the courtroom. He is kind to the very young, thoughtful in his decision making and stern with those experienced enough to deserve it.

Oliver also has the straight face of a successful poker player. Calm in the face of drama, he does not give away much to those looking for a sign of what he may be thinking. This can be difficult for counsel accustomed to “watching their audience”, and they should be careful of that calm exterior. Oliver has a quick and decisive mind and a wicked sense of humour.

All who appear before him should remember that Judge Fleck is a cat person, not a dog person. Know that and let it guide you in your conduct in his courtroom.



## The Honourable Judge Andrea Davis

On December 16, 2020, Andrea Davis was appointed as a judge of the Provincial Court of British Columbia. Sworn in on January 11, 2021, she has been assigned to the Fraser Region, where her resident chambers are in Surrey. Her appointment came as no surprise but was to the great delight of those who know and love her.



A force in every sense of the word, there is no one better suited to the job of judging than Andrea. The people of this province and the justice system will be most ably served by her fierce intelligence, deep compassion, profound commitment to the law and fairness, common sense and boundless energy.

Born and raised in Kamloops, Andrea is the second youngest of five siblings, a highly competitive and strong-willed bunch. One had to stand up and be counted, or get lost in the shuffle. And stand up she did. Intense debate was a family pastime that allowed Andrea to hone her skills of persuasion and conflict resolution. Never daunted by her older siblings, it was clear from the start that Andrea was destined to be an advocate. By the age of five, she knew she wanted to be a lawyer, exposed to the profession through the firm now known as Fulton and Co. in Kamloops, where both her mother and aunt worked as legal assistants.



The Davis children spent their winter weekends skiing at top speed down the slopes of what was then Tod Mountain. Summers were spent at the Shuswap and, later, around the family pool in the scorching Kamloops summers. Athletic titans each of them, they also participated in and excelled at every sport imaginable. To this day, family gatherings often involve some form of tournament or sporting event, purportedly for fun, but always with some kind of competitive edge.

Andrea obtained a B.A. in criminology from Simon Fraser University in 1987. She went on to work in an administrative role for Crown counsel at 222 Main Street, and then as a social worker in youth and adult women's corrections in Toronto. After returning to British Columbia, she worked as a child protection social worker before heading off to law school.

While attending law school at UBC and needing next to no sleep, Andrea accomplished the near impossible by continuing to work nearly full-time for MCFD's Emergency Services. Before graduating from law school in 1993, she spent a semester at the University of Melbourne, where she made life-long friends and established a permanent bond with Australia.

After graduating, Andrea clerked at the Supreme Court of British Columbia for Chief Justice Esson, Associate Chief Justice Campbell, Justice Dohm (as he then was) and others. Andrea found her clerkship invaluable; it was a learning experience that guided her approach to legal issues and advocacy throughout her career as a lawyer.

Andrea articulated at Alexander, Holburn, Beaudin & Lang, where she impressed everyone with her enthusiasm, tenacity and street smarts. After her call to the bar in 1995, she remained there as an associate working in the area of insurance law, quickly earning the respect of her colleagues and clients. Her mentor at the time still remembers how much he missed her when she left to pursue child protection litigation and various civil litigation roles at other firms.

Pregnant with her youngest son, and by then a mother to her oldest son (a rambunctious toddler), Andrea changed course and joined the advocacy group at the B.C. Government and Service Employees' Union ("BCGEU") representing aggrieved workers from diverse professions and backgrounds, who often suffered from mental health and addiction challenges.

In 2001, Andrea left law and Canada with her boys and their father for Detroit, Ann Arbor, Seattle, Australia and Hagatna, Guam. While in Guam, she dipped her toes back into legal waters and worked as an arbitrator on the United States' federal "no child gets left behind" legislation, ensuring that children from Guam were afforded equal access to in-school supports for disabilities or learning challenges.

Andrea and her boys returned to Canada in 2005. She resumed her legal career working for the BCGEU once again, where she remained until her appointment. Throughout her tenure at the BCGEU, Andrea was highly respected. A very talented litigator, she was known for her formidable but fair approach and her willingness to take on the most challenging of cases. Her last case involved ten “clients” and 43 days of hearing. Especially skilled at cross-examination, Andrea resolved many cases after cross-examining the employer’s first key witness and negotiating skillfully. A committed mentor and support to many junior colleagues, and intolerant of unfairness and inequality in her midst, Andrea also represented her co-workers in disciplinary and harassment matters within the BCGEU.

Always devoted to her boys, Andrea balanced the demands of working as a lawyer and a thousand commitments at home with apparent ease, operating the family calendar with military precision—or so the boys tell us. Not only did she immerse herself in their school activities (homework, school projects, parent advisory council meetings, etc.), but she also spent many years managing and volunteering for their various and multiple sports teams, including baseball, hockey, football and rugby. When she was not endlessly organizing, fundraising and scorekeeping, Andrea was the noisiest and most exuberant spectator in the arena and on the field. She and the boys also travelled far and wide, to Australia, Costa Rica, Nicaragua, Africa, and each summer throughout the United States and to West Hawk Lake, Manitoba to visit family. But their greatest passion was and is skiing whenever and wherever possible. Andrea hopes to continue to ski with the boys and anyone else who can keep up with her, as did her father with her, well into his 70s. Although sitting still is not her style, Andrea is also a hockey and football fanatic and, more recently, rugby sevens fan. If you dare to watch a game with her, bring some ear plugs and prepare to talk endlessly about player stats and game strategy.

Another thing about Andrea: she has that rare ability to make people feel heard—really heard. She listens intently because she cares deeply. And she remembers. Many years later she will revisit a conversation once had with someone about a difficult time in their life or a particular suffering that others have long since forgotten. Andrea has not.

Her talent for listening, along with all of her other exceptional qualities, are to the good fortune of all who appear before her. We have no doubt she is already distinguishing herself in her new role.

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## The Honourable Justice Julianne Lamb

Barrister, bencher, adjunct professor, managing partner, parent, spouse, mentor, volunteer, lecturer, dog lover, hiker, occasional yoga practitioner, gracious host: Justice Julianne Lamb finds a kind of balance in being busy at all times and never at rest.

Julie was born in Mississauga, Ontario. Within a few years, the Lamb family grew to include Julie's sisters, Marnie and Jen. A few months after Marnie was born, the Lamb family moved from Brampton back to Ottawa. Family has always been very important to the Lambs, and the move to Ottawa was to be closer to family: Julie's father, Bob Lamb, was originally from Ottawa; her mother, Jill (*née* Turpin), was from Aylmer, Quebec.

Jill and Bob met in Ottawa, where Bob practised law. Bob had a bachelor of science degree from St. Patrick's College and a bachelor of laws degree from the University of Ottawa. Bob was called to the bar of Ontario at Osgoode Hall (years later, at age 60, Bob was to return to York University and complete a master's degree in tax law). Jill had completed high school and took a year of commercial college before commencing her career as a legal secretary. Jill eventually worked with Bob as his legal administrative assistant and bookkeeper, and continued in that role while also taking the lead in raising their three girls, including Julie.

In 1974, the Lamb family moved to Mountain Township, Ontario. For readers unfamiliar with Mountain, it has since been amalgamated with Winchester Township and the independent villages of Chesterville and Winchester, forming North Dundas. Wikipedia describes North Dundas as "primarily rural, with a few small villages ... spread across the South Nation River and East Castor River watersheds". According to the 2016 Census, North Dundas boasts a population of 11,278; back in 1974, however, Mountain was a small town.

Bob set up a sole practice in Winchester and was always busy. When he was not working at the office, he could be found working at home or visiting clients, often farmers.

Julie attended elementary school at Nationview Public School in South Mountain (which is south of the mountain, of course). Built in 1972, the school had a first enrolment of 450 children who worked in groups according to skill level in literacy and math, moving from group to group as skills



developed. For reasons that will become apparent, this approach suited Julie just fine.

Julie was a strong student from the get-go. Her academic excellence carried on through high school at North Dundas District High in Chesterville. It is an unverified rumour that she won all the awards. It is reported that in grades 8 and 13, she was the gold medal winner and valedictorian. Undoubtedly, her academic success had something to do with her affinity for one of the rare subjects in which students can potentially obtain a mark of one-hundred per cent and yet few dare to tread: mathematics.

Despite her love of math, Julie had an active social life and was well liked. She was involved in various sports, including basketball and baseball, the latter of which Bob coached and therefore insisted that each of his daughters play.

Julie was “a laid-back keener” who managed to balance hard work with having fun. She was always very driven and successful, yet she maintained her humility. By the end of high school, she was president of the student council, yearbook editor and (as noted) class valedictorian. Through some early feat of advocacy, she managed to wrangle a European exchange out of grade 12, fast-tracking her academic program to do so. The result: an unsuspecting French student billeted with the Lambs in Mountain for three months and, in exchange, Julie spent two months “studying” in Marseille and another month in Bretagne.

Julie spent her summers working as a lifeguard and teaching swimming lessons at the local pool. An average summer would see 50 children come and go—a big splash in a small town. Summers also included family vacations, including trips to Europe, impromptu drives for dinner across the border and spontaneous trips to watch the Expos or, occasionally, the Red Sox play a home game. Winters were spent together skiing at Mont-Tremblant, Saint-Sauveur or in Vermont.

Julie loved math so much that, in 1990, she completed a bachelor of mathematics degree at the University of Waterloo. She was also a don while in residence and an active participant in intramural clubs. She then attended the University of Toronto for her bachelor of laws degree, graduating in 1993.

It is reported that Julie had a hard time letting go of math. During law school, she eagerly awaited the delivery of each edition of the Waterloo Math Newsletter. But, whether she liked it or not, it was clear from early on that law was likely in her future. Bob always suspected Julie would follow in his footsteps as a lawyer, but he also predicted she would someday become a judge. Lawyering was just something that fit with her personality:

Julie was a strong advocate and was often persuasive. The judge part was something else: Julie has always been regarded by family, friends and colleagues as even-keeled, hardworking, intelligent, rational and—critically—able to appreciate people for who they are, to understand things from their perspective and to communicate meaningfully with them. She has also always been very decisive.

Julie summered with Bull Housser & Tupper in 1992. She completed full articles with Harper Grey and was called to the B.C. bar in 1994. She carried on as an associate with Harper Grey until 1996, when she moved to Robertson Downe and Mullally for a brief stint before joining Skorah Doyle Khanna, a firm started by three notable Harper Grey alumni. In 2004, she moved to Lindsay Kenney, where she worked closely with Rick Lindsay, Q.C., and Jan Lindsay, Q.C. In 2008, she joined Guild Yule, not long after Mark Skorah, Q.C., and Jim Doyle had joined. Julie was a partner with Guild Yule from 2011 until her judicial appointment. Her practice focused on professional negligence and regulatory matters, complex personal injury claims and insurance coverage disputes. In 2014, she taught her first of many insurance law classes at UBC. She was so active in CLE that in 2016, she was recognized as one of the most prolific volunteers over the previous 20 years.

Julie was appointed Queen's Counsel in 2018. She was elected as a benchler for Vancouver County for 2020, after serving as a non-benchler member on the Complainants' Review Committee from 2014 and on the Discipline Committee from 2018. She was a longtime co-author of the insurance chapter for the CLEBC *Annual Review of Law & Practice* and contributing author of the annual *British Columbia Motor Vehicle Accident Claims Practice Manual*. Before her appointment, she had served as chair of the CBABC Advisory Committee to the Judicial Council regarding the appointment of Provincial Court judges, a committee she first joined as a member in 2013.

As mentioned, family is very important to the Lambs. As a partner at Guild Yule, Julie treated the firm as family and saw the partnership as a marriage. However, the most important family members are her own: her husband, Dan; her children, Matthew, Megan and Liam; and Dan's son, Hunter. The children have been a constant source of inspiration. All four of them are kind, funny, thoughtful and independent people, and Julie is justifiably proud of them. For his part, Dan is a calm and steady partner, a reliable source of joy and fun, and never one to complain when asked to retrieve something from a high shelf.

In August 2019, Julie and Dan became proud East Vancouverites. They live in a classic 1927-built home with their dogs, Ruby and Lola—or, more

accurately, Ruby and Lola live in a classic 1927-built home and let rooms to Julie and Dan in exchange for treats, walks and tons of affection.

Of her life as a lawyer, people who know her best say that Julie was a team player, always willing to pitch in or help out as needed. She picked up files and trials effortlessly. She had an incredible work ethic and expected no less of the lawyers she worked with. However, she also expected those lawyers to take a breath when time and circumstances allowed. She was a go-to resource for clients, lawyers and students. She took the mentorship and promotion of younger lawyers, especially but not exclusively women lawyers, very seriously, including in her formal mentorship role with the Women's Law Forum.

Julie was appointed as a judge of the Supreme Court of British Columbia on April 27, 2021. Parties and counsel can expect Justice Lamb to be informed, prepared, unassuming and a careful listener who will ask questions sparingly but always in critical areas. She will be careful to ensure that everyone is heard, and will also understand and take seriously the responsibilities that come with running a courtroom. She will be keenly aware that the parties anxiously await her decision. British Columbians will be well served by the long judicial career that lies ahead for Justice Lamb.





# NEW MASTER

## The Honourable Master John Walter Bilawich

John Walter Bilawich was appointed as a master of the Supreme Court of British Columbia on December 21, 2020. John brings with him personality traits and legal experience that will serve him and the administration of justice in this province well.

The youngest of three children, John was born in Estevan, Saskatchewan, where he lived until age five. His family then moved to Whitehorse, Yukon, where John grew up. His father, Walter, worked with the Yukon government, and his mother, Pauline, at a local bank. John has two older sisters, Paula and Sandra. John is married to Ana-Maria. They have a daughter, Andrea.

John obtained his B.A. in public administration from the University of Saskatchewan in 1988 and his LL.B. from the University of Alberta in 1991. He articulated with Russell & DuMoulin in Vancouver. After completing articles, John relocated to Victoria and joined Dinning Crawford as an associate. In 1995, he moved to Clay & Company.

In 2000, John married Ana-Maria and returned to Vancouver, where he joined Holmes & King as an associate. That firm eventually became Holmes & Bilawich in 2017, then Holmes Bilawich & Stewart. John remained there until his appointment as a master. His practice in recent years focused on commercial and estate litigation.

John has extensive experience in family, personal injury and other civil litigation, including difficult and complex cases. He has appeared in all levels of courts in British Columbia, and once in the Supreme Court of Canada. His breadth and depth of legal knowledge is readily apparent and impressive to those who have dealt with him.



John has been an active volunteer with a variety of legal organizations and his daughter's school. For many years, he volunteered as a judge in the PLTC civil trial moot. He has authored articles and presented at programs through CLEBC and the TLABC. He served on the executive of the CBABC Vancouver Civil Litigation subsection, the TLABC's Rules Committee and for several years on the TLABC's board of directors. He was one of the guest editors for the British Columbia Courthouse Library Society's Clicklaw Wikibooks publication for several years. He also served as a member of the Attorney General's B.C. Supreme Court Rules Committee.

I met John at the beginning of our second year of undergraduate studies at the University of Saskatchewan. We were assigned to the same apartment in a student residence. John and I were two of six young men assigned to that apartment. At the time, John was contemplating a degree in computer science. John's calm, quiet demeanour made him a great roommate. His fun-loving attitude and keen sense of humour made him a pleasure to socialize with. His intellect made him an ideal person to proofread any paper I needed to complete for my courses. He approached that task with a thoughtfulness, patience and thoroughness that I could not have reasonably expected, and as a result, I found myself having to defend my thoughts in lengthy, challenging but interesting debates with him. I can't help but think those debates played a part in John transferring the focus of his studies from computer science to public administration.

Although we were assigned to different apartments the following year, John and I remained friends. We enjoyed playing hockey on the same team and socializing in overlapping friend groups. John's love of movies and books exposed me to art I would not have otherwise come across. John was always a valuable teammate, colleague and friend.

For reasons I cannot understand, John chose to pursue the study of law at the University of Alberta rather than the University of Saskatchewan. He excelled in his studies, joining the law review and volunteering in several clinics through Student Legal Services. John completed his legal studies at the U of A in 1991.

During our second year of law school, John mentioned the matching program used by students and firms in Vancouver. As a result of that, I applied for articling positions in Vancouver. John and I agreed that we would again share an apartment during articles. By then I was married, and the plan was that John, my wife and I would live together. It was just after we found an apartment that my wife and I learned we were expecting. I duly contacted John and gave him the news. Without hesitation, he agreed to share a place with a newborn baby.

Again, during our articling year, John proved himself to be a valuable roommate, colleague and friend. John's generosity, kindness and patience, especially towards my infant daughter, are difficult to put into words, and impossible to ever repay. After articles, John relocated to Victoria, and I relocated to Prince George. We were able to stay connected over the years and keep one another up to speed on our families and work. As impressive as John's professional accomplishments are, his greatest sources of joy and pride are Ana-Maria and Andrea. John is a devoted, caring and happy husband and father.

Of course, John's skills, knowledge and accomplishments have changed greatly over time, but his personality has not. He is curious, intelligent and thorough. He is careful, diligent, thoughtful and ethical. He is compassionate, empathetic, generous and humble. He has a sharp wit and sense of humour.

A little luck never hurts, and of course I wish him that, but I could not be happier or more certain of a person's prospects for success on the bench than I am for John.



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# LETTERS TO THE EDITOR



Dear Editor,  
Re: Advocate Subscription

I am thrilled to learn that my subscription to the *Advocate* will continue to include a free membership with the Law Society.

**Angus MacLennan**  
Surrey

Dear Editor,  
Re: Civil Debate

I too write with respect to Shahdin Farsai's article on [journal.ca](http://journal.ca) and the subsequent letters to the editor in the past few issues of the *Advocate*. My comments are not about the pronoun practice direction itself; they are about the debate around it. Regardless of one's opinion about the practice direction, everyone has an interest in the profession's ability to sustain civil debate and make room for opposing views.

Character attacks on authors of opposing views and shaming and threatening publications for publishing them have the effect of silencing debate and curtailing participation in the profession, and in this case it seems they are aimed at doing exactly that. To suggest that debating the practice direction is tantamount to bigotry is an oversimplification and a fallacy. Nor is any social or legal issue or decision of the courts inherently undebatable in a free and democratic society.

It is bad news for the profession and society at large when we value groupthink and take offence at intellectual opposition. It is of course far easier to fire quick tweets condemning an idea and an author than to write a reasoned analysis of their views. Tweets, not essays and debates, are the preferred tool of campaigners. It

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\* Letters to the editor may be e-mailed to [mbain@the-advocate.ca](mailto:mbain@the-advocate.ca). Letters published do not necessarily reflect the views of the *Advocate* or its staff. We encourage a diversity of voices and views in our pages.

seems the irony of the situation is lost on those lawyers who call for impingement of the freedom of expression and freedom of the press.

Yours truly,  
**Nazanin Aram**  
Vancouver

Dear Editor,  
Re: "Grumble" by the Hon. Grant Burnyeat, Q.C.  
(2021) 79 Advocate 767

I was delighted to see the sole Grumble published in the September 2021 edition of the *Advocate*. The former LSBC treasurer not only quoted Master Funduk's very famous comments about *stare decisis*, but also signalled the re-emergence of L.A.R.G.E.! As someone of rather average proportions (if I do say so myself), I always delighted in the witty banter back and forth between S.M.A.L.L. and L.A.R.G.E. What a masterful performance by the Hon. Grant Burnyeat, Q.C.!

**Kenneth Armstrong, Q.C.**  
Vancouver

Dear Editor,  
Re: The Advocate Wine

I recently learned that Coonawarra Wineries in South Australia produces a Cabernet Sauvignon blend named "The Advocate". If

you could please bring this letter to Michael Welsh, Q.C.'s attention (our colleague learned in the law and in the delights of Dionysian libation), perhaps he may be able to acquire a bottle of The Advocate and let us know whether drinking it is nearly as enjoyable as reading the *Advocate*.

**Fernando de Lima**  
Victoria

Dear Editor,  
Re: Practice Direction 59

I am completely in favour of pronouns being declared in court per Practice Directive 59. My only question is why is the judge or justice not expected to do the same?

Yours truly,  
**Glen Krueger**  
Vancouver

Dear Editor,  
Re: Brian McDaniel, "Serious Business: Rowing and Lawyers in British Columbia" (2021) 79 Advocate 197

Brian McDaniel missed one more rower who is both a lawyer and an Olympic rower: Brendan Hodge (see <[en.wikipedia.org/wiki/Brendan\\_Hodge](https://en.wikipedia.org/wiki/Brendan_Hodge)>).

**Carol Roberts**  
Vancouver

# LEGAL ANECDOTES AND MISCELLANEA



By D. Michael Bain, Q.C.\*



## THE EXTRAORDINARY LIFE AND DEATH OF FRANCIS MAWSON RATTENBURY

The Heritage Vancouver plaque on the side of the old Vancouver courthouse (currently the Vancouver Art Gallery) tells only a fraction of the story. “This Neoclassical building”, it says, “has massive ionic columns, a central dome, formal porticos and ornately carved stonework. F.M. Rattenbury won a design competition for the building in 1905. At the time he was B.C.’s most prominent architect having also designed the Parliament Buildings and the Empress Hotel in Victoria.” Apart from being a prominent architect, what on earth could be so interesting about Rattenbury to inspire

---

\* D. Michael Bain, Q.C., is the editor of the *Advocate*.

a number of books,<sup>1</sup> at least one film<sup>2</sup> (starring Helen Mirren) and even an opera.<sup>23</sup>

Francis Mawson Rattenbury was born in Leeds, England in the year of Canadian Confederation and was 25 years old when he arrived in Vancouver in 1892. He announced himself in the *Vancouver Daily World* with standard self-aggrandizing flare by placing a notice proclaiming his arrival and falsely stating that he had trained in architecture under the renowned architect Henry Lockwood. In fact, Lockwood had died when Rattenbury was 11 years old, and it was some eight years later that Rattenbury began working at the firm of Lockwood's former partner in Bradford, England (albeit not as an architect). During his six years with W & R Mawson, the firm was not involved in designing any buildings of importance.

One of Rattenbury's first actions on arriving in British Columbia was to enter a competition to design a replacement for Victoria's two-storey wooden Legislative Hall and accompanying buildings (also known as "The Birdcages" because of their shape). Rattenbury was one of 66 applicants, and he signed his entry "A B.C. Architect", suggesting that he had a long association with the province (which he did not) and that he was an architect (which he was not). After two rounds of voting, the 25-year-old Rattenbury was declared the winner and his ambitious 600,000 square foot blending of Romanesque, Classic and Gothic features is what stands in Victoria to this day. In a pace that we can only marvel at more than a century later, the *Parliament Buildings Construction Act* of 1893 was proclaimed and within five years the buildings were officially opened (albeit \$423,000 over the original \$500,000 budget).

Rattenbury married his first wife, Florence Nunn, in 1898 just before the Parliament Buildings were completed, not so much to celebrate his achievement but to "do the right thing" as evinced by the child she gave birth to some seven months later. Their honeymoon was spent in a tent in the Chilkoot Pass, a trail to the Yukon where 60 people had recently died in an avalanche. Rattenbury made the trip fearing that news of the disaster would harm his business prospects in the area, so he undertook it so he could write about the experience positively and from first-hand experience. He supplied meat and cattle to prospectors during the Klondike Gold Rush, ordering three steamships to serve the Yukon Territory. This venture was profitable for him as his architectural career took off.

For the next 20 years, Rattenbury would win almost every commission he pursued. In Victoria, he designed many notable buildings, including the Canadian Pacific Railway Steamship Terminal, the landmark Empress Hotel, the Lieutenant Governor's Residence (since destroyed by fire, although the

stone portico still adorns Government House), the Crystal Gardens and the Bank of Montreal (now the Irish Times Pub). Elsewhere in the province, he designed the Vancouver courthouse (now the Vancouver Art Gallery), the Merchants Bank in Nanaimo (now the Vault Café) and the Bank of Montreal buildings in Rossland and Nelson. He is also responsible for the Scottish baronial styling of the Nanaimo Courthouse and the Nelson Courthouse. Rattenbury designed Mount Stephen House in Field (dismantled in 1963) and Chateau Lake Louise (the one that burned down in 1924) as well.

After falling out with his commissions for the CPR, he turned to their competition, the Grand Trunk Pacific Railway Company, for whom he designed several hotels and stations. However, none of these were completed because of the death of its president, Charles Melville Hays, with the sinking of the RMS *Titanic*. Rattenbury was also notoriously difficult to work with. He was a control freak who would constantly tinker with his own designs, causing last-minute costly changes that would sometimes have him rejecting materials that had already been purchased. Having underestimated costs to win commissions, Rattenbury would often saddle his contractors with cost overruns, to the point of pushing them to bankruptcy.

In the meantime, Rattenbury got caught up with rumours of colluding with government officials to procure the commission for Victoria High School, abusing his position to secure the Government House contract and even criminal activity of using kickbacks to line his own pockets. He was also accused of using materials from a job site to renovate his own home. Rattenbury nearly went bankrupt when some land he had bought next to the Grand Trunk Pacific Railway (which went bankrupt soon after losing its president) was appropriated by the government.

At the age of 53, Rattenbury met the 23-year-old Alma Pakenham, a twice-divorced flapper from the roaring 20s who listened to jazz and smoked and drank in public—quite unheard of for a young woman in Victoria at that time. The two began an affair in secret, but when Florence Nunn refused to grant Rattenbury a divorce, he made the affair public, galivanting about Victoria with Ms. Pakenham and even bringing her home for drinks while his wife hid upstairs “taunted by the sound of their lovemaking” as *The Scotsman* newspaper described it. Victoria society was scandalized and Rattenbury fell out of favour. Even when Florence granted Rattenbury his divorce in 1925 and he married Pakenham, he and his new wife continued to be shunned. With ruined reputations, Rattenbury and Pakenham moved to Bournemouth, England in 1929.

The 1930s would prove to be the eventual undoing of Francis Rattenbury. In Bournemouth, the couple hired an 18-year-old chauffeur named George

Stoner, who soon moved into the spare room. Pakenham was in her 30s, and Rattenbury was in his 60s and in failing health, brought on by years of abusing alcohol. When Stoner became infatuated with Pakenham, Rattenbury basically resigned himself to his wife's proclivities with the chauffeur and lost himself each night in alcohol and talk of suicide.

On March 23, 1935, Francis Rattenbury was found with his head smashed in by a carpenter's mallet. He never regained consciousness and died four days later. Pakenham confessed to the murder, but Stoner later told a maid that he was the one who swung the mallet. They were both charged with murder. The resulting joint trial at the Old Bailey was voraciously consumed by the press, with every aspect of the scandal reported. Pakenham's infidelities, sexual trysts with Pakenham's infant son in the room, and Stoner's violent rages and addiction to cocaine helped sell a lot of newspapers. Pakenham even withdrew her confession, which her lawyer, Ewen Montagu,<sup>4</sup> argued had been motivated by her love of Stoner, whom she hoped to spare from the death penalty.

At the trial, it was found that Stoner, learning of an apparent reconciliation between Rattenbury and Pakenham, flew into a rage and beat Rattenbury with a hammer while he was asleep in his chair. Montagu had argued that Alma was a woman who "by her own acts and folly had erected in the young man a Frankenstein of jealousy." In a stunning conclusion to the trial, Pakenham was acquitted and Stoner was convicted and sentenced to hang. *The Meriden Daily Journal* reports on what happened a few days later:

Christchurch England. June 5. (AP) – The body of a woman who stabbed herself six times in the chest and flung herself into the River Stour last night was identified today as that of Mrs. Alma Rattenbury acquitted five days ago of charges of complicity in the mallet murder of her aged husband.

William Mitchell, a herdsman, told authorities he saw the woman sit on the river's bank, thrust a dagger into her body and then plunge into the water.

He said he attempted to seize her as she jumped and barely missed clutching her heel.

The dagger sheath was found by the river in a handbag which also contained several notes. Some of the notes mentioned George Stoner, Mrs. Rattenbury's 19 years old chauffeur, who was sentenced to hang for beating Rattenbury to death with a mallet.

Mrs. Rattenbury was 31 [*sic*] years old and a native of Victoria, B.C. She was married twice before becoming the wife of the 67 years old victim of the Bournemouth slaying. Her first husband was an army officer who was killed in the World War and her second an American professor from whom she was divorced.

It was learned that Mrs. Rattenbury who wrote songs under the name of Lozanne, sent a letter by special messenger yesterday to Stoner in prison.



The scene of the drowning was not far from Bournemouth, where the Rattenburys lived.

George Stoner managed to have his sentence commuted to life in prison. He was helped, no doubt, by a petition signed by some 300,000 people who felt that a sinister Alma Pakenham had provoked him to commit the murder on her behalf. As it turned out, he was released to serve in World War II, earning his eventual freedom through various acts of bravery. He died in 2000 at the age of 83 having lived in obscurity.

John Rattenbury, son of Francis and Alma, was born in Victoria in 1928 and orphaned in 1935. He eventually returned to British Columbia to live with his grandmother in Vancouver, but when she died shortly after his arrival, he lived with an aunt. While a student at St. George's, he won a student school-design contest (not knowing of his father's career) and eventually studied architecture under Frank Lloyd Wright with whom he worked, among other things, on New York's Guggenheim Museum. He died in Arizona at the age of 92 in March 2021.

You can, perhaps, see how all of this might not fit on a Heritage Vancouver plaque after all.

#### ENDNOTES

1. Anthony A Barrett & Rhodri Windsor Liscombe, *Francis Rattenbury and British Columbia: Architecture and Challenge in the Imperial Age* (Vancouver: UBC Press, 1983); John L Motherwell, *Gold Rush Steamboats: Francis Rattenbury's Yukon Adventure* (2012); David Napley, *Murder at the Villa Madeira: The Rattenbury Case* (London: Weidenfeld & Nicolson, 1988).
2. *Cause Célèbre* (1987) (directed by John Gorrie, starring Helen Mirren, Harry Andrews, David Suchet and David Morrissey).
3. *Rattenbury: A New Canadian Opera* by Tobin Stokes.
4. Captain The Hon Ewen Montagu, CBE, QC, DL, RNR, who was a junior barrister at the time he defended Alma Pakenham, later became known for his leading role in Operation Mincemeat, a military deception operation that successfully misdirected the German forces' attention away from the Allied invasion of Sicily in 1943. He was Judge Advocate of the Fleet from 1945 to 1973.

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# BENCH AND BAR



**T**hose in the know report that the winter solstice for 2021 will occur at 7:58 a.m. on Tuesday, December 21. It is the day with the fewest daylight hours. As such, it is often known as the “shortest day” of the year or the occasion of the “longest night”. Just in time, we provide some news that we hope will brighten your days. Happy Yule to you all!

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**Harman Bains** moves from Gowlings to join Lawson Lundell. **Mat Brechtel** leaves Norton Rose Fulbright to launch a boutique IP firm called Seastone IP. Joining him from their former firm of Gowlings are **Scott Foster** and **Tania D'Souza Culora**. Eyford Partners welcomes **Drummond Lambert**, who was previously at Clark Wilson. **Cheri Eklund** joins the Kelowna office of Eyford Partners, having previously been at Armstrong Naish Trial Lawyers. **Isabelle Lam** leaves Lawson Lundell's Kelowna office to take up a post at the Red Deer Crown Prosecutors' Office. After a run of ten years, **Vivienne Stewart** closes Railtown Law and joins YLaw Group as associate counsel. **Liyan Wu** lands at Clark Wilson from Chen & Leung. **Brett Love** and **Michael L. Drouillard** leave their positions at the Department of Justice and Harper Grey, respectively, to form a new law practice called Drouillard Lawyers. **H. Lance Williams** moves to McCarthys from Cassels. **Raman Johal** hops from Clark Wilson to Gowlings. **Ravina Sandhu** joins Hamilton Duncan from Smyth Hoover Sandhu. Also joining Hamilton Duncan is **Anisha Jagpal**, formerly with Dominion Law Group.

Pulver Crawford Munroe beefs up its ranks with the addition of **Kerri Crawford**, moving from Stewart McDannold Stuart, and **Taylor H. Topliss**, for-

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Lawyers who have moved their practices should e-mail details of their past and present circumstances to Peter Roberts, Q.C., at <benchandbar@the-advocate.ca> to ensure an appearance in “Bench and Bar”. Note that we do not report changes in lawyers’ status within their firms (from associate to partner, for example) other than in cases where persons formerly articulated have been hired as associates.

merly with McLean & Armstrong. **Thomas Moggan** moves from O'Neill Law (a member of Northwest Law Group) to Norton Rose Fulbright. **Marichelle Defensor-Jiloca** joins Lawson Lundell from Michael, Evrensel & Pawar. **Gib van Ert**, formerly the principal of Gib van Ert Law, has joined forces with **Brent B. Olthuis**, formerly with Hunter Litigation Chambers, to form Olthuis van Ert. **Cole Rodocker** is now with Hamilton Duncan, having left Lawson Lundell. In news from the Island, the Victoria law firm of Clay & Company has wound down after 100 years in existence. Moving from there, **Margaret A. Sasges, Q.C.**, and **Chanelle C. Gilbert** start a new firm, Camas Law, which will focus on estate law. **Stephen P.E. Curran** moves from McCarthy Tétrault to Lakes Whyte in North Vancouver.

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**Clare M.F. Jennings**, Crown counsel in Victoria, began her stint as the CBABC president for 2021/22 in September. She takes over from **Jennifer J.L. Brun**, the first CBABC president to serve their term entirely during a pandemic. Clare appears on the cover of this issue.

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In case it is ever of assistance, judicial notice may be taken of the fact that automobiles were in use in and around 1940 in the Victoria area: *Grant v. Lowres*, 2016 BCSC 1654.

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In other judicial notice news, it is fair game for a court to accept without evidence that there are dozens of marinas in British Columbia of a goodly size with a single access road: *McDonell v. Lambourn Holdings Ltd.*, 1977 CanLII 385 (B.C.S.C.).

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**Kory Wilson** was appointed to a special advisory committee to the Board of Education for School District No. 57 (Prince George) for a term ending March 31, 2022.

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The seven days around the winter solstice are often referred to as “halcyon”, denoting a period of calm from winter storms so that kingfishers can breed. Greek myth credibly reports that Aeolus, a god with power over the wind, refrained from causing any storms and calmed the seas at this time of year so his grieving daughter, Alycone, who had been transformed into a kingfisher after hurling herself into the ocean upon the death of her husband, could make her nest on the beach.

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Spencer Elden, who appeared swimming underwater as a four-month-old baby grasping at a dollar bill on the cover of Nirvana's 1991 album *Nevermind*, is suing the band for alleged sexual exploitation. The California law-

suit alleges that “the images exposed Spencer’s intimate body part and lasciviously displayed Spencer’s genitals from the time he was an infant to the present day”. Elden’s lawyer argues that the inclusion of the dollar bill (superimposed after the photograph was taken) suggests the four-month-old Elden was a “sex worker”. *Nevermind* has sold over 30 million copies, and Elden previously celebrated the anniversary of the album by recreating his pose (albeit with swimming trunks) on the 10th, 17th, 20th and 25th anniversaries of the album’s release date.

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The Paisley Irregulars is an informal group of lawyers and judges (some active, some retired) centered on the **Honourable Martin R. Taylor, Q.C.**, a former justice of the British Columbia Court of Appeal and Supreme Court, and Cayman Island Court of Appeal. The Paisley Irregulars comprises Mr. Taylor’s former judicial law clerks and several other members *honoris causa*.

In honour of Justice Taylor and his longstanding interest in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), and in anticipation of the 90th anniversary of that seminal decision, this irascible group has launched The Paisley Irregulars Essay Competition in Negligence Law. This school year (2021/22) is the inaugural year. The details of the competition are set out in the Call for Submissions and Competition Rules, which can be found at < [www.paisleyirregulars.ca](http://www.paisleyirregulars.ca) > .

The competition is open to Canadian law students and articulated students. Papers submitted for academic credit at law school are eligible (and may be revised for submission to the competition). There will be a monetary prize for the winning entry (and likely publication of the winning paper in a leading B.C. law journal).

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The website of the Royal Museums Greenwich explains that the term “solstice” “comes from the Latin solstitium meaning ‘Sun stands still’, because the apparent movement of the Sun’s path north or south stops before changing direction. At the winter solstice, the apparent position of the Sun reaches its most southerly point against the background stars.”

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**Dawana Jeanne St. Germain** was appointed as a public member to the board of the College of Chiropractors of British Columbia for a term ending December 31, 2023.

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In “Stopping by Woods on a Snowy Evening”, former U.S. poet laureate Robert Frost described his protagonist stopping with his horse “[o]n the

darkest evening of the year” to watch another’s “woods fill up with snow”—whether it was also the longest night is not clear, though what is clear is that there were “miles to go before I sleep”.

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Litigation and its participants may also have miles to go before sleeping. Justice Farley noted the “many more steps to be taken successfully” before the reorganization at issue could be concluded and that “[t]here are many more miles to go before anyone can think of sleeping. I continue to urge all concerned to focus and get on with the tasks at hand. No one should think they smell the turkey yet; if they do, they are wishful dreaming”: *Companies’ Creditors Arrangement Act, Re*, 2004 CanLII 9707 (Ont. S.C.). And in determining the costs of a motion in *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2016 ONSC 174, a fellow judge of the Ontario Superior Court of Justice noted that “[t]his litigation has miles to go before it sleeps and the winner today may prove the loser tomorrow. I therefore seek only to get an appropriate balance struck for this one step and shall leave the next steps to another day.”

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As the *ABA Journal* reported, “As of Jan. 1 [2019], you are able reproduce the Robert Frost poem *Stopping by Woods on a Snowy Evening* without fear of copyright infringement.” It and other works published in 1923 “had been set to enter the public domain in 1999. But a law passed the prior year [the *Sonny Bono Copyright Term Extension Act*] ‘hit a two-decade pause button and extended their copyright term for 20 years’”.

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**Patrick Aldous** of Chandler Fogden Aldous has been appointed senior vice president, business and legal affairs at Nettwerk Music Group Inc.

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“Correction: In yesterday’s paper in Chris Searle’s jazz albums column, we incorrectly referred to Don Rendell as a ‘terrorist’ when it clearly should have been ‘tenorist.’ We apologise for any offence.”—*The Morning Star*

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The Dongzhi Festival in East Asia “celebrates the return of longer daylight hours and ultimately an increase of positive energy. The festival’s origins can be traced back to the yin and yang philosophy of balance and harmony”: < [www.rmg.co.uk/stories/topics/when-winter-solstice-shortest-day](http://www.rmg.co.uk/stories/topics/when-winter-solstice-shortest-day) >.

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At page 658 of the September 2021 issue of the *Advocate*, the editor, D. Michael Bain, Q.C., referenced “Access Pro Bono” as receiving \$355,773 in 2019. In fact, he should not have used the word “Access”. We understand from **Jamie Maclaren, Q.C.**, that the amount of \$355,773 was split among a variety of pro bono initiatives including Access Pro Bono, Pro Bono Stu-



dents Canada and Rise Legal Clinic. While the number is correct for all of these initiatives, Mr. Maclaren advised that Access Pro Bono received only \$250,000. We regret the error.

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The week of November 14 to 20, 2021 has been proclaimed Victims and Survivors of Crime Week in British Columbia. It is followed immediately by Restorative Justice Week on November 21 to 28, 2021.

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On the installation of fences between neighbouring properties, Robert Frost's poem "Mending Wall" has been treated as akin to judicial precedent, though judges do not appear aligned on whether the poet favoured or implicitly criticized the fencing at issue. Outlining the situation in *Beffort v. Zuchelkowski*, 2016 ONSC 583, in which the plaintiffs claimed that through adverse possession they owned a strip of the defendant's land, Justice Trimble noted:

[1] In "Mending Wall", poet Robert Frost and his neighbour are engaged in their annual spring ritual of repairing the stacked stone wall that divides their properties. Frost asks the neighbour why they do it every year. He asks why they need the wall. There is nothing on either property that needs containing except pine trees on the neighbour's and apple trees on the writer's, neither of which will wander. The neighbour merely answers "Good fences make good neighbours." For every reason Frost puts forward for not having the wall, the neighbour repeats "Good fences make good neighbours." Frost, convinced that his neighbour will never change, resigns himself to mending the wall.

[2] This case shows us that, sometimes, the neighbour is correct. Good fences do make good neighbours – provided they are placed on the property line.

But sometimes the neighbour is not correct. In *Arthurs v. Matthews*, 2021 NBQB 160, the New Brunswick Court of Queen's Bench noted that "[c]ontrary to the oft-misunderstood line in Robert Frost's poem, 'Mending Wall', good fences do not make good neighbours. Case in point: the Respondents have erected a fence preventing their neighbours, the Applicants, from accessing a portion of a drive way between them. Neighbourly relations are now far from good."

And our Supreme Court noted in *Dainow v. Tait*, 2003 BCSC 1040: "Counsel provided me with case law which unhappily illustrates the fact that fences, which ostensibly might create good neighbours, in fact seem capable of creating legal arguments."

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We found this old correction from *The Economist*. Pedants unite! "In our article about the death of Kofi Annan on August 23rd we said that he wore a

goatee. An alert reader has pointed out that he sported a Van Dyke, which is a goatee plus moustache. Sorry to split hairs."

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"Shab-e Yalda 'Yalda night' or Shab-e Chelleh 'night of forty' is an Iranian festival celebrated on the 'longest and darkest night of the year'. Friends and family get together to eat, drink and read poetry until the early hours. Pomegranates and watermelons are particularly significant": < [www.rmg.co.uk/stories/topics/when-winter-solstice-shortest-day](http://www.rmg.co.uk/stories/topics/when-winter-solstice-shortest-day) > .

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In *Robertson v. The Queen*, 2010 TCC 552, the court looked to Robert Frost for assistance in defining the term "avocations" (of hunting and fishing) used in a treaty involving the Norway House First Nation: "In the early 1900s Robert Frost wrote in the last verse of Two Tramps in Mud Time: 'My object in living is to unite my avocation and my vocation as my two eyes make one in sight.' That unity seems to be reflected in the use of the word 'avocation' in the Treaty although, admittedly, it would be preferable to have an expert opine on that view".

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In news from Nova Scotia, **S. Dulcie McCallum**, a retired member and dedicated *Advocate* subscriber, has a new designation to add to R.N. and LL.B.: M.F.A. student at King's University College.

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**Dianna Rose Robertson** was appointed as a public member to the board of the College of Naturopathic Physicians of British Columbia for a term ending July 31, 2024.

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The New Brunswick Court of Appeal has noted that December 21 "is commonly known to be the shortest day in the year" and, in determining how dark it was on December 25, noted that date was only four days later. It held that "a Court in this Province can take judicial notice of the fact that on Christmas Day in New Brunswick it is dark at 5.30 p.m. and that when it has become dark on a clear and fine day, as was December 25, 1958, it is then later than a half hour after sunset": *Dugas v. Leclair* (1962), 32 D.L.R. (2d) 459.

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It is also apparently known that there is an underground economy in Canada in which payments for goods and services are made in cash as a tax evasion ploy. Indeed, this has been found to be a social fact of such notoriety that judicial notice of it may be taken: *Stevens Pools Ltd. v. Carlsen and Carlsen*, 2015 BCPC 23.

"Life was not so sweet for readers who tried to make torta di mele using our recipe (*La dolce vita*, 28 September, page 10, Feast). Three eggs and 15g of baking powder were missing from the ingredients and the method."—*The Guardian*

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Lee "Scratch" Perry, a musical visionary who pioneered dub and roots reggae, died in late August 2021. Shortly after working with Perry in Jamaica in 1980, Paul McCartney was found with 219 grams of cannabis in his luggage at Tokyo's Narita International Airport. Facing up to seven years of hard labour, McCartney was arrested and put in jail. The former Beatle's case was taken up by "Scratch", who wrote a letter to the Japanese Minister of Justice stating: "Please do not consider the amount of herbs involved excessive. Master Paul McCartney's intentions are positive." Whether Perry's letter helped or not, "Master" McCartney was released from Japanese jail after nine days and deported to England, where he later became Sir James Paul McCartney, CH, MBE. Sir Paul gave up cannabis in his 70s wanting to set a better example for his grandchildren. Perry, meanwhile, smoked well into his 80s, blowing clouds of smoke onto master tapes to enhance the recordings.

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"Among the Germanic and Celtic tribes the winter solstice or the return of the sun in December was celebrated long before the adoption of Christianity and was known as 'yule' a term still used for the season. The holly, the mistletoe, the yule log and the wassail bowl are relics of pre-Christian times": *King v. Village of Waunakee*, 185 Wis. 2d 25 (1994).

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"Correction: An earlier version of this review misstated a song lyric. Adele sings 'Hello from the other siiiiiide,' not 'outsiiiiide.'"—*The New York Times*

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Ontario's Deputy Judge Marty Klein has applied the "good fences" approach to various cases including, in *Braich v. Singh*, 2015 CanLII 5780 (Ont. S.C.J.), to the merits of having a written agreement: "Applied here - it is far wiser for people to define the terms and limits between them, in a written agreement, rather than rely upon oral/verbal arrangements. A good written agreement, coupled with receipts if payment is in cash or canceled cheques, will result in clear definition, should a situation 'go south.'" And more elaborately in *Dukit.com (DUKuniversal) v. McDonald*, 2006 CanLII 84246 (Ont. S.C.J.), where the same judge considered cross-claims regarding work "to install a wireless network in the defendants' home", the judge noted: "the plaintiff ought not to have 'let down its guard (fence)' and (a) produced its initial quote in writing ... . Had this been done (there being

good fences), the boundaries would have been clear and everyone would be certain of their obligations (remaining, in the end, 'good neighbours').

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**Craig A. Ferris, Q.C.**, was recently recognized by *Canadian Lawyer Magazine* as one of the "Top 25 Most Influential Lawyers" in Canada for 2021 in the business category.

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"Correction: An earlier version of this story incorrectly located Brooklyn in the Canadian province of Quebec. It is in New York."—*The Washington Post*

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Climate Change? Over the last few months, the province has invoked the authority of the *Water Sustainability Act* to restrict the use of water from each of Bessette Creek, the West Kettle River, the Salmon River and the Koksilah River to protect the survival of the fish populations.

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The U.S. Court of Appeals for the Second Circuit (composed of Frost fans) invoked the poet's name in *Scribner v. Summers*, 84 F.3d 554 (1996), an appeal from a decision of the district court that had found that the Scribners (onto whose property barium from the defendants' property had migrated) had not proven common law causes of action, under New York law, for strict liability, trespass or private nuisance. The court noted: "Robert Frost counseled that 'good fences make good neighbors.' ... Alas, if only Mr. Frost had fashioned a solution to migrating barium. The decision of the district court is REVERSED and REMANDED for a determination of damages."

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In California, "The Governor shall annually proclaim the date corresponding with the second new moon following the winter solstice, or the third new moon following the winter solstice should an intercalary month intervene, as the Lunar New Year": California Govt. Code, § 6730 (2020).

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Under the authority of the *Expropriation Act*, **Susan E. Ross** was appointed as an inquiry officer in respect of the notice of request for inquiry received from 0926342 B.C. Ltd. for described land in the New Westminster District, while **V. Nerys Poole** was appointed as an inquiry officer in respect of a proposed expropriation from Martin O'Brien of land in the Similkameen Division Yale District.

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In *Klafta v. Smith*, 17 Utah 2d 65 (1965), the Supreme Court of Utah considered a case in which the plaintiff had "sued for injuries suffered when her son's car, in which she was riding, collided with a cow which had fallen on the highway from the defendant's truck". The court noted: "It will be

recalled that December 29 is near the winter solstice, so it was dark at that time. The cow was of the Black Angus breed and was thus difficult to see on the dark highway, and the car ran into it, resulting in the injuries to plaintiff for which she seeks recovery."

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The website of the Royal Museums Greenwich explains that "[a]t the spring and autumnal equinoxes the day and night hours are around the same length, each lasting around 12 hours. The number of daylight hours peaks at summer solstice."

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Robert Frost has been called upon to help determine whether a person is ordinarily resident in Canada, as in *Fisher v. R.*, 1994 CarswellNat 1149 (T.C.C.). While the court noted there were "unquestionably factors that would justify a conclusion that [the appellant in that case] was resident in Japan and not Canada", "the conclusion that is more consonant with the tests of ordinary residency enunciated in other cases is that by 1987 Canada had become again his place of ordinary residence." Bowman A.C.J. explained that Canada "was a country whose language [the appellant] spoke and of which he was a citizen by birth. He had a right to come to Canada whenever he chose. That can be said of no other country. One is reminded of the passage in Robert Frost's poem, 'The Death of the Hired Man': 'Home is the place where, when you have to go there, They have to take you in.' This observation would apply to Canada." Bowman A.C.J. continued that "[t]heoretically, it might conceivably be possible to be resident nowhere, if one kept constantly on the move, such as the captain of the legendary phantom ship, *The Flying Dutchman*, but in real life it really does not work that way. If one had to pick one place on earth where the appellant was resident in 1987 and 1988 that place would be, in my view, Canada."

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The Frost analysis (via *Fisher*) was also applied to the question of whether the aptly named Pamela Snow was resident in Canada: "Mrs. Snow considered Vancouver as the place where she could 'reconnect' and where, if she needed a place to stay, she could stay. Mrs. Snow sojourned in Belize, that is, her stay in Belize was temporary. Vancouver was her home; it was the city where her home was located and was 'the place where, when you go there, They have to take you in': *Snow v. The Queen*, 2004 TCC 381."

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As noted in our September issue, the CBABC recently launched its Robe Bank program. They collect court robes from people who have them (and are perhaps retiring) and loan them to the people who need them. They accept dry-cleaned robes and waistcoats in good condition from anywhere in the province. For more information, visit <[cbabc.org/robebank](http://cbabc.org/robebank)>.

Various U.S. law firms advertise class proceedings related to the recall of 2005–2010 Pontiac Solstice vehicles. Those law firms include Pennsylvania's Munley Law firm, which explains on its website that "General Motors has recently recalled approximately 2.6 million vehicles due to defective ignition switches that may suddenly, and without warning, shut off the Pontiac Solstice's engine and disable its airbags. Heavy and bulky key chains as well as bumpy roads can cause the ignitions to switch out of the 'run' position and shut off", with potentially tragic consequences.

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Robert Frost's poem "The Road Not Taken" has featured in U.S. case law including *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corporation*, 992 F.2d 430 (1993). There, the U.S. Court of Appeals for the Second Circuit considered the lower court's application of the principles related to preliminary injunctions when it should instead have applied the principles underpinning specific performance. The Court of Appeals commented that "R. Frost's journeyer, after choosing 'The Road Not Taken,' darkly observed, '[a]nd that has made all the difference.' ... Here too the district court took a less travelled road, which made all the difference in the result it reached. Taking the wrong legal path led it to the wrong destination."

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A rather biting dissent in *Pacific First Bank v. The New Morgan Park Corporation*, 122 Or. App. 401 (1993) noted that "[w]hen we come to a fork in the road, we need not, like Robert Frost, 'take the road less travelled by.' We should take the better road".

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Stonehenge attracts visitors wanting to celebrate the winter and summer solstices there. Recently, Save Stonehenge World Heritage Site Limited partially succeeded on its application for judicial review of the Secretary of State for Transport's decision to grant a development consent order for the construction of a new portion of the A303 that "would have a dual instead of a single carriageway and would run in a tunnel 3.3 km long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site" ("WHS"): [2021] EWHC 2161(Admin.). As Justice Holgate noted in the course of detailed and technical reasons for judgment, in 1986 the World Heritage Committee inscribed Stonehenge and Avebury as a WHS having "Outstanding Universal Value" ("OUV"). The WHS is said to be of OUV for qualities which include the following:

- Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.



- There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age.

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In September 2021, **Kenneth Glasner, Q.C.**, FCI Arb., received an award recognizing his “significant contributions” to the Vancouver International Arbitration Centre (“VanIAC”). **Gerald Ghikas, Q.C.**, and **Tina Cicchetti** are recipients of the VanIAC Award for Excellence in Arbitration.

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At the Annual General Meeting of the Law Society of British Columbia on September 24, 2021, the benchers passed the following resolution:

The *Advocate* – The *Advocate* per lawyer funding will slightly increase to \$25 per lawyer to provide funding for the operating budget to keep net asset reserves at the current level. The *Advocate* publication is distributed bi-monthly to all BC lawyers.

We thank the *Advocate* Superfans for bending the ears of their benchers and getting us this far. We now welcome 2022 (our 80th year of publication) with renewed hope. After all, this is no time to die.

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Thought *du mois*:

“History isn’t kind to men who play God.”

—James Bond (1921–present), international espionage expert  
and blunt instrument,  
*No Time to Die* (2021)



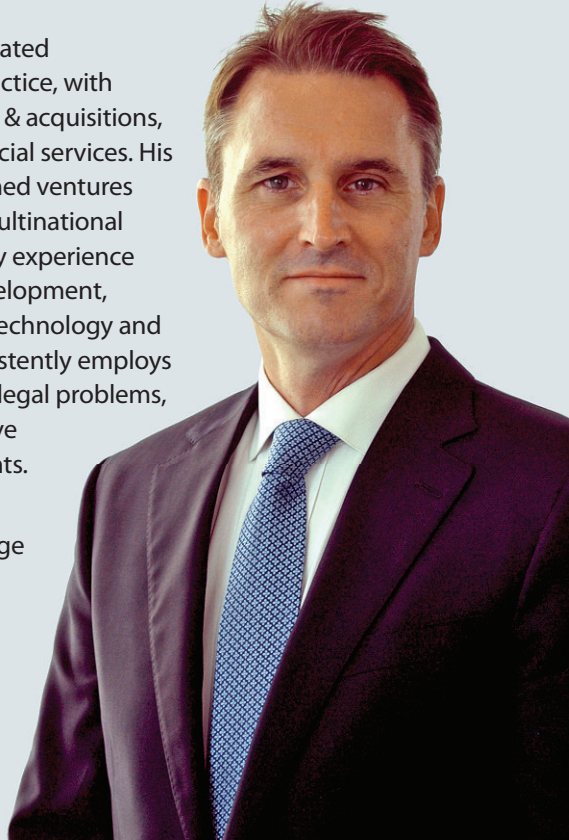
## LAKES, WHYTE LLP

**Is pleased to announce the addition of  
Stephen Curran to our legal team.**

Stephen maintains a sophisticated transactional business law practice, with experience spanning mergers & acquisitions, private investments and financial services. His clients range from newly-formed ventures to banks and other mature, multinational enterprises. Stephen's industry experience includes natural resource development, infrastructure, agri-business, technology and transportation. Stephen consistently employs a commonsense approach to legal problems, and works efficiently to achieve positive outcomes for his clients.

Prior to joining Lakes,Whyte, Stephen was a partner at a large national business law firm in Vancouver and before that he worked in New York City at a US law firm. Stephen is excited to bring his cross-border experience to North Vancouver.

**[scurran@lakeswhyte.com](mailto:scurran@lakeswhyte.com)**



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Lakes, Whyte LLP has been providing legal services to the residents and the businesses of the North Shore since 1986.

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# CONTRIBUTORS

**The Honourable Justice Geoffrey Gomery** was appointed to the British Columbia Supreme Court in 2018. Apart from a year spent seeking (and obtaining) his B.C.L. at Oxford, he spent 31 years practising with Nathanson, Schachter & Thompson LLP. He did not speak until he was three.

**Mathew P. Good** is the principal of Good Barrister, a firm dedicated to class actions. He is a former judicial law clerk to the Honourable Chief Justice Beverley McLachlin. He is a member of the bars of British Columbia, Alberta and Yukon.

**M. Ali Lakhani, Q.C.**, has practised law in British Columbia for over four decades. He was the first chair (appointed by His Highness the Aga Khan in 1986) of the Ismaili Conciliation and Arbitration Board ("CAB") for Western Canada, later serving on CAB Canada and, since 2015, on the international CAB, a body that oversees mediation and training for CABs in some 20 territories globally. He is the founder and editor of the journal *Sacred Web* (<[www.sacredweb.com](http://www.sacredweb.com)>), the leading journal on applying metaphysical first principles to issues of modernity.

**Lorne Phipps** is Crown counsel in Victoria. Lorne's sense of humour winds its way into areas that overlap with the editor's, but nevertheless does not wind its way into print.





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### Primary Contacts



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**Kevin Gourlay**  
14+ years of litigation experience. Former insurance defense lawyer, now acting for plaintiffs only.

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