

NOVA VOICE



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The Voice of the Legal Profession in Nova Scotia



Never
Say
Never

Memories
of Summer
Camp

PRESIDENT'S REPORT

By **ROBYN ELLIOTT, QC**

What will the legal profession, legal services and law practice look like as the new generation of lawyers reach mid career?

CBA National aims to provide answers to this questions and more with the release of the *Legal Futures Initiative Report* at the 2014 "Converging Futures" CLC in St. John's next month. The comprehensive *Futures Report* will provide a framework and tools to assist all lawyers in remaining relevant in a changing legal marketplace.

CBA-NS is celebrating the release of the landmark *Futures Report* in a number of important ways.

First, the CBA-NS Branch delegation to the Converging Futures CLC will include ten young lawyers attending on Branch sponsorship. These CBA members will be in attendance for the release of the *Futures Report*. We are excited to have these young lawyers - already active volunteers in the CBA and the profession - enjoy the full CLC experience. We look forward to their reports to the membership over the coming year. We see potential future CBA leaders in this accomplished group!

Second, in November 2014, the Branch Sections will participate in *Futures Month* in collaboration with the Nova Scotia Barristers' Society. Look for Section activities throughout the month featuring a variety of consultation and reporting items on the subject of Legal

Futures. We look forward to thoughtful discussion and input from members.

Third, throughout the 2014/2015 program year, our Young Lawyers Section will hold a series of "Letters to a Young Lawyer" events for all lawyers described by organizer (and incoming Young Lawyers Sections Chair, Amanda Dillman), as follows:

"Dear me (age 25)..." Inspired by Alan Dershowitz's *Letters to a Young Lawyer*, the 2014-2015 Young Lawyers Section program will see senior lawyers in various fields present a letter written by them to today's young lawyers, reflecting on their own experience in the legal profession. From their biggest mistake (and how they fixed it!) to what they are most proud of and tips on how to take your career to the next level, the CBA-NS young lawyers will have a chance to pick the brains of the leaders of our profession. "Yours truly (old and wiser)."

This is my final message as CBA-NS Branch President. I am grateful to have had the opportunity to serve as the Association's President. Rest assured the future of the Branch is in good hands under Incoming President, David Cameron, Vice President, Amy Sakalauskas and a diverse group of committed volunteer lawyers.

Thank you.

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Cover Photos by Bruce Jollimore

The Lawyers of Parliament Hill

By JENNIFER TAYLOR

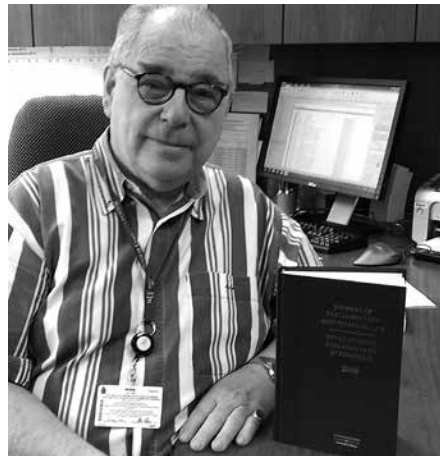
Gregory Tardi practices law in the “political bubble” of Ottawa. In May, Mr. Tardi presented to Nova Scotia’s Constitutional and Human Rights section on his position as Senior Parliamentary Counsel (Legal Services) to the House of Commons. He explained the inner workings of a legal operation that is vastly different from a traditional law firm or government office. So, what does life inside the bubble look like for the lawyers of Parliament Hill?

- **There is an intricate web of governing instruments:** Numerous instruments guide the practice of Parliamentary counsel – a “bewildering array,” as Mr. Tardi puts it. Of course, the Constitution Acts and decisions of the Supreme Court of Canada on parliamentary privilege and parliamentary law are at the top of the list. After that, it gets a bit more complicated.

There is the Parliament of Canada Act, RSC 1985, c P-1, which confirms that Members of Parliament and Senators enjoy Parliamentary “privileges, immunities and powers”. Among other things, it also permits the examination of witnesses under oath before Parliament; provides for the internal administration of both Houses of Parliament including the establishment of the House of Commons’ Board of Internal Economy (“BOIE”); and addresses questions of ethics and salary, among other matters.

Mastering the role of the Board of Internal Economy, an entity often described as “secretive,” is crucial for Parliamentary practice. Described on its website as “the governing body of the House of Commons,” one of the BOIE’s main functions is determining whether MPs’ expenditures are proper. The BOIE is currently making headlines for determining that mass mailings sent by the NDP were partisan, thus invalidly incurred, and therefore violated House rules on postal services.

Other key instruments for Parliamentary practice include: Standing Orders of the House of Commons, which are procedural in nature and considered *sui generis* when it comes to their legal status; By-laws of the Board of Internal Economy, made under the *Parliament of Canada Act*; and the *Members’ Allowances*



and *Services Manual*, which is described on the Parliament of Canada website as “a comprehensive guide to the Board of Internal Economy’s current policies related to budgets, allowances and entitlements for Members, House Officers and Research Offices.” There is often debate amongst lawyers and “proceduralists” on Parliament Hill over which instrument prevails in a given scenario.

(For more information on the Board of Internal Economy, its by-laws, and the *Manual*, check out <http://www.parl.gc.ca/about/house/boie/boie-e.html>.)

- **There are multiple decision-making bodies:** Several forums render decisions relevant to Parliamentary practice. Two are especially important to Mr. Tardi’s work: the Board of Internal Economy, and the House of Commons Standing Committee on Procedure and House Affairs (PROC). This Standing Committee has a wide mandate, covering issues related to elections; conflicts of interest; general administration; referendums; and privilege. (For the full mandate of PROC, see ss 104(2)(s), (3), (4) and 108(3)(a) of the Standing Orders of the House, available online: <http://www.parl.gc.ca/About/House/StandingOrders/toc-e.htm>.)
- **There are different branches of lawyers advising the House of Commons:** Mr. Tardi and his colleagues are part of the Office of the Law Clerk and Parliamentary Counsel. Section 11 of the BOIE’s *Governance and Administration By-Law* requires that: “The Law Clerk and Parliamentary Counsel shall

ensure that legal services are provided to the Speaker, the Board, committees of the House, its Members, the Clerk and the officials of the House Administration, shall ensure that legislative services are provided to Members and committees of the House and shall perform such other functions as the Clerk may assign.” The Office is thus split into two halves: Legal Services and Legislative Services. Lawyers in the Office remain separate and distinct from the federal Department of Justice. (The Senate has its own Law Clerk and Parliamentary Counsel.)

- **The distinctions between “parliamentary” or “non-parliamentary” and “partisan” or “non-partisan” are paramount:** The definition of “parliamentary functions” is found in section 1 of the BOIE’s *Members By-Law*, and “means the duties and activities that relate to the position of Member, wherever performed and whether or not performed in a partisan manner, namely, participation in activities relating to the proceedings and work of the House of Commons and activities undertaken in representing his or her constituency or constituents.” As the recent situation with the NDP’s mailings demonstrates, there is often vigorous debate over what constitutes a “parliamentary function” versus a partisan activity. Much of Parliamentary counsel’s ‘bread and butter’ involves advising on this delineation.
- **The identity of your client may vary:** Parliamentary counsel are, at various times, tasked with giving advice to the House of Commons itself, or to the Speaker, but at other times may be advising the Clerk of the House of Commons; a committee; an individual MP; or the BOIE – always remaining on guard for conflicts of interest. In all instances, they must of course maintain political neutrality.

Giving legal advice to the ones who make the law: as Mr. Tardi describes it, life inside the political bubble is often like a “100-ring circus,” but one that makes for a very interesting case study for those of us on the outside.

Sections Spotlight is a recurring feature focusing on a recent meeting or initiative of a CBA-NS section. Jennifer Taylor is a research lawyer with Stewart McKelvey in Halifax and a member of the editorial board of Nova Voce.

Much Ado About Sea-Doos:

The SCC on settlement privilege and mediation

By JENNIFER TAYLOR

Overview

What happens when parties agree to mediation in a multi-million dollar lawsuit and appear to reach agreement on a settlement amount, but then disagree on the scope of that settlement? Can evidence from their mediation negotiations be admitted in later court proceedings challenging the scope of the settlement, as an exception to settlement privilege? The answer from the Supreme Court of Canada's recent decision in *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35 is yes – unless the parties' mediation contract clearly provides otherwise.

Settlement privilege, as Justice Abella put it in *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, “wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.” But a key exception to the privilege makes evidence from settlement negotiations admissible for the limited purpose of proving the existence, terms, or scope of a settlement (what I have termed the “proof of settlement” exception). *Union Carbide* reviews the interplay between the proof of settlement exception—which limits confidentiality—on the one hand, and provisions in private mediation contracts that guarantee confidentiality, on the other hand.

Justice Wagner wrote the unanimous decision in this appeal from Quebec (he is one of only two Quebec judges on the Court right now). While the Court appeared to give great weight to freedom of contract, the end result means that only clear and explicit confidentiality provisions in mediation contracts will suffice to oust the proof of settlement exception; otherwise, parties will not be seen to have “renounced their rights” to prove the terms and scope of a settlement allegedly reached at mediation. The provision at issue in *Union Carbide* was not clear or explicit enough, meaning that the plaintiffs' allegations of what occurred during mediation were permitted to form part of their motion for “homologation” – a civil law procedure for judicial confirmation of an alleged settlement.

Facts

The Bombardier plaintiffs had sued the Union Carbide / Dow Chemical defendants in 2000 for providing defective gas tanks for use on Sea-Doos, claiming that the material used on the tanks had caused explosions that injured riders and damaged their watercrafts. Bombardier had to issue three recalls and faced several consumer lawsuits.

The appeal before the Supreme Court of Canada focused on fallout from the parties' private mediation before a lawyer in 2011. They had signed a standard-form mediation agreement provided by the mediator, which included this confidentiality clause:

2. Anything which transpires in the Mediation will be confidential. In this regard, and without limitation:

(a) Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding;

(b) No statement made or document produced in the Mediation will become subject to discovery, compellable as evidence or admissible into evidence in any proceeding, as a result of having been made or produced in the Mediation; however, nothing will prohibit a party from using, in judicial or other proceedings, a document which has been divulged in the course of the Mediation and which it would otherwise be entitled to produce;

(c) The recollections, documents and work product of the Mediator will be confidential and not subject to disclosure or compellable as evidence in any proceeding.

Dow offered \$7 million in settlement during the mediation session, and agreed to give Bombardier 30 days to decide whether to accept. Bombardier did accept, but subsequent communications between counsel revealed that the parties had very different ideas about the ambit of what they had concluded during mediation. Dow considered its offer to be a “global settlement amount” such that Bombardier would release it from liability “in any future litigation... anywhere in the world and involving any gas tank models”; not surprisingly, Bombardier assumed the amount related only to the Quebec litigation, and only to two gas tank models.

Bombardier eventually filed a motion for homologation, seeking a court order for the \$7 million settlement amount. Dow then brought a motion to strike several paragraphs of Bombardier's motion documents, which described what happened during and after mediation, arguing that they violated the confidentiality provision in the mediation contract. Justice Wagner summed up the dispute:

In short, Bombardier's view is that the settlement is limited to the ongoing Montréal litigation, and seeks to admit evidence from the mediation session to enable it

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Business Tips for Lawyers, and a Few Good Reads



By **AMANDA DILLMAN**

If the early bird gets the worm, the recent joint breakfast meeting of the Solo, Small Firm and General Practice & Young Lawyers Section Meeting should result in lots of fishing bait.

Speakers Tim Hill, Q.C. (Boyne Clarke), Julia Cornish, Q.C. (Sealy Cornish Coulthard), and Chris Weisenburger (Beyond the Box Law) led a roundtable discussion moderated by Young Lawyers

Section Chair Andrew Taillon. There was some valuable nuggets of advice shared by the speakers who have “been there, done that” that beg to be passed on. Here are the top 10 takeaways:

1. Being good at law doesn't mean you're good at business. Take the time to educate yourself in the areas of hiring, staffing, finances, marketing, and time management.
2. Be careful with whom you enter associate and partnership relationships. You may find yourself paying the next few months' rent and moving to a new office to avoid them.
3. Bring business cards everywhere – lots and lots of business cards.
4. Don't hire a staff member or associate based on who you'd most like to have a beer with; while that's an important quality, it's critical that they also fit the culture of the firm as a whole and have the skills required by the role. Hire slow, fire fast.
5. By hiring mid-level lawyers you may be missing out on an opportunity to train your associates how to do it the right way (i.e., your way).
6. Getting and keeping work is about relationships, not the Yellow Pages or a blog. When you receive work from another firm because of a conflict, be sure to send the client back to their firm of origin for future business. Know your market.
7. Develop your own client base – you won't go wrong if you want to stay on your own or in a small firm, or eventually join forces with a bigger organization.
8. There's a big place for small firms.
9. Do good work. If you do a good job for a client they will tell three people; if you do a poor job, they will tell ten.
10. Get involved in your legal and outside community – sit on boards, use your legal and other skills, and be involved in the CBA!

And while we're in the spirit of top-10 lists, the following is Julia Cornish's “Firm Founder's” reading list, which was circulated at the meeting:

1. *The Seven Habits of Highly Effective People* (Stephen Covey)
2. *The E-Myth Revisited: Why Most Small Businesses Don't Work* (Michael Gerber)
3. *How to Start & Build a Law Practice* (Jay Foonberg)
4. *Flying Solo: A Survival Guide for the Solo and Small Firm Lawyer* (William Gibson)
5. *Time Management for Attorneys: A Lawyer's Guide to Decreasing Stress, Eliminating Interruptions & Getting Home on Time* (Mark Powers & Shawn McNalis)
6. *How Good Attorneys Become Great Rainmakers* (Mark Powers & Shawn McNalis)
7. *Hire Slow, Fire Fast: A Lawyer's Guide to Building a High Performance Team* (Mark Powers & Shawn McNalis)
8. *The Busy Lawyer's Guide to Success: Essential Tips to Power Your Practice* (Reid Trautz & Dan Pinnington)
9. *The Fulfilled Lawyer: Create the Practice You Desire* (Kathleen Paukert)
10. *Law Practice Magazine* (American Bar Association)

Career Compass is a recurring feature focusing on a workplace issue of interest to CBA members. Amanda Dillman is an associate with Sealy Cornish Coulthard in Dartmouth and vice-chair of the Young Lawyers Section of CBA-NS.



In attendance at the Supreme Court of Canada and CBA Board of Directors Dinner, L to R: Amy Sakalauskas, Vice-President, Level Chan, National Equality Committee Chair, Robyn Elliott, QC, President



Laura Kanaan

Called to the bar: 2010

Firm: McGinty Doucet Walker

Area of practice: Family Law

Describe your professional experiences to date:

After graduating from law school at Dalhousie University, I articulated and practiced at a small firm in Charlottetown, PE. Being at a small firm exposed me to a wealth of hands on experience in a variety of practice areas. While in Charlottetown, I appeared frequently in the Family Section of the Supreme Court and learned that I really enjoyed advocacy work. That said, while I appreciate the vital role the courts play in our system, I also quickly realized that most families would benefit from a multi-disciplinary approach to dispute resolution. I began exploring alternative dispute resolution and received my training in Interdisciplinary Collaborative Practice. In 2012, I moved to Nova Scotia and took a contract position before starting my permanent position with McGinty Doucet Walker. I became involved with the Association of Collaborative Professionals of Nova Scotia and am currently Secretary of the Association.

Describe your current practice: I deal primarily with family law files including matters related to custody, access, division of property and support. I enjoy files that have a complex financial component. Wherever possible, I promote the use of dispute resolution and continue to encourage a multi-disciplinary approach to problem solving. A couple nights a month I do a shift with the after hours duty counsel phone. This involves providing advice to people who are potentially facing criminal charges. Although I don't get much sleep those nights, I think it's an important service and I am happy to participate.

Describe one of your most satisfying achievements in practice: In my second year of practice, because of my involvement with the collaborative law association in PEI, I was asked to present at the CBA ADR National Section Meeting in Vancouver. I gave a short presentation on ADR developments in PEI and had an opportunity to listen to other representatives speak about ADR development in their jurisdictions.

Describe your involvement with the CBA, both past and present: I have been involved with Law Day since my articles in 2009. Last year, I visited JL Ilsley High School over a period of several weeks to assist the law classes with their Law Day moots, where I also acted as the judge. While in Prince Edward Island, I co-presented "The Perils of Property Law" at a CBA CLE. Our presentation focused on environmental issues in real property transactions. I regularly attend CBA functions, including events hosted by the Family Section and the Women's Forum. Recently, I was the recipient of one of the Young Lawyer's Scholarships for attendance at the CBA Canadian Legal Conference in St. John's this August. I look forward to bringing new ideas back to share with my colleagues.

What other activities and volunteer pursuits occupy your time? My

husband and I try to travel whenever time permits. We are involved with the Lebanese Festival in Halifax. In my spare time, I take Latin ballroom lessons (salsa, tango and rumba). I am a facilitator for the Parent Information Program at the Family Court and participate in several access-to-justice initiatives. Currently, the Collaborative Law Association is designing a new website and I am heavily involved in that.

Why did you decide to practice law? What drew you to your area(s) of law? If you ask my parents, they'd tell you that, when I was about three, I could hold my own in most arguments. But truthfully, I always knew I would end up in a "helping" profession. In family law, one size does not fit all, and I enjoy being challenged to generate creative solutions for my clients. I also enjoy being a strong advocate for clients in need. Most of my family law clients are facing the most difficult thing they have ever gone through. It is very rewarding to help them resolve their issues, and know that I made a difference for them.

What do you consider to be the greatest challenges facing young lawyers? I think young lawyers struggle to find their place in the practice of law. Coming out of law school, our expectations about practicing law are usually not in line with reality. We expect to be challenged by things like work life balance, billable hours and a steep learning curve. I don't think we expect to question whether we enjoy the work itself, yet I think many of us do. This (of course) leads to stress because they have poured their resources into their education and training. If you are fortunate enough to land in your dream job right out of law school, congratulations. For the others who are still grappling with whether this was a good career path - please don't leave the profession. When it comes to practicing law, there are so many options. A change of practice area or work environment may be the difference between a mediocre job and a fulfilling career. Reach out to those lawyers who seem to enjoy what they do and not to be afraid to ask questions and seek advice. I have gladly shared my experience with other young lawyers. Most people like to talk about what they do, and lawyers are no exception.

What do you wish senior lawyers understood about young lawyers? I wish that senior lawyers could remember the steep learning curve they faced as young lawyers. Demands on all lawyers are usually high, but young lawyers are adjusting to those demands plus many other new experiences. It can be overwhelming. Be patient. Be understanding. It's fine to demand high standards from young lawyers; they should demand the same of themselves. But understand that the only way to get experience is to work hard and at times, fumble through it.

What words of wisdom do you have for new lawyers? Don't be shy about calling the lawyer on the other side of a file, especially if they are a senior practitioner. You may be surprised what you can accomplish. Honour your profession by working hard and learning as much as you can. And finally, if your parents muttered that you'd make a good lawyer when you were three, thank them for their insight.

Never say never – a lesson from the reluctant chicken farmer

By ANN LEVANGIE, QC

It is funny how life works out...when I was called to the bar 10 years ago (yikes) I was practicing family law at a wonderful firm in the HRM. My life then took me to Truro and the commute became a burden so I looked for opportunities closer to my new home. I was apprehensive about leaving HRM because I was led to believe "HRM is where the action is". I was wrong.

In 2006, I started practicing in Truro and I never looked back. I have the best of both worlds as I am in a supportive environment, practicing law in a wonderful firm and in a great community. Don't get me wrong, work can still be stressful and demanding. It is funny though, when you love the people you work with, both in and out of your firm and have positive supports at home, the stress and demands are easier.

The bar in Truro is second to none. I have made lifelong friends who have been with me through the trials and tribulations of life. Some of my dearest friends are those who I met through my career in Truro and I would not give that up for anything. They support my quirky and offbeat sense of humour. When I thought that Truro would be a challenge for my career, I was wrong. It was the best career move I have made.

What practicing in Truro has also allowed is for me to become a reluctant chicken farmer. I live in Enfield (the Hants side) with my wife, my dog, my cat and my four chickens on our little oasis on the Shubenacadie River. Yes, my four chickens. My wife is a veterinarian so I begrudgingly agreed to her request to get chickens. Never did I think I would ever have chickens, let alone actually love them.

One year ago, Loretta, Margaret, Helen and Darlene came into our lives. It was a shaky start for me and the chickens and I was a reluctant parent to my "feathered children". My spouse travels with her job, leaving the chickens in my care on a fairly frequent basis.



This was not usually met with enthusiasm on my part in the early days.

Late last fall, after a lengthy settlement meeting, I received a message to call home immediately. I did, only to find out that Loretta was being taken to the clinic because she broke her toe. Two sets of x-rays and a toe splint later, Loretta was back in the fold. Never did I think I would have a chicken that had x-rays. I was wrong. In fairness, while my wife was taking this all very seriously, I thought it was hysterical.

About 10 days after that, the chickens were

allowed to roam free for the first time ever. It was a glorious day for them as they pecked and scratched about. Unbeknownst to me and my wife, the neighbour's dog was also out and about and happened to enjoy chicken. After we found the neighbour's dog and contained her, we could only find three chickens; Loretta was missing. Our dog (who adores the chickens) was let out and led us to her on the edge of the woods. I will spare you the details, but needless to say, she was in pretty rough shape.

The strangest thing happened...I fell in love with the chickens that day. I built a warming nest, assisted my veterinary spouse in the fixing of wounds and care of Loretta and, most shockingly, agreed that Loretta could live in our house (in a kennel) during her period of convalescence. I can honestly say, I never would have believed in a million years that I would let a chicken live in my house. I was wrong. I can honestly say that I would never have watched football with a chicken on my lap, I again was wrong.

Never did I think that I would be greeted when I get home by four chickens coming to say hello. I was wrong. Never did I think that when I sit by the river that I would have four chickens scratching about. I was wrong. Never did I think that a major topic of conversation and laughs with my friends would be chickens. I was wrong. Never did I think that as I barbecued chicken for supper, chickens would be roaming below the barbeque. I was wrong.

Simply put, life is full of twists and turns and I have come to learn that the unexpected sometimes brings the best rewards, and I have come to learn to never say never. Never did I think I would be in Truro which led me to this wonderful life as a reluctant chicken farmer.

Nova Voices features the viewpoints of lawyers around Nova Scotia. Ann Levangie is a lawyer with Patterson Law in Truro.

Memories of Summer Camp

By **THERESA GRAHAM**

Ahh, summer camp! Marshmallowy treats on the campfire. Paddling those long thin boats around the lake. Repeated failed attempts to escape.....ok, I admit it: I never went to summer camp. But I did read Gordon Korman's "I Want to Go Home" about a thousand times as a child. I once went to a "Girl Guide Camp"...does that count? We tented outside in typical Nova Scotia spring weather, which is to say, it snowed. Four other girls and I spent the entire weekend in a canoe, fingers white with frostbite, desperately trying to get our canoeing badge. On Sunday, we were told that the final requirement to obtaining the badge was to swim across the lake towing the canoe over our heads and, as it was too cold to do so, we left for home empty handed!

Having been turned off to the idea of camps of any kind after that, I asked Candee McCarthy, Jessica Lyle, Jim Rossiter and Derek Land to share their summer camp stories with us.

Candee McCarthy – Sampson McDougall: I actually always went to summer camp from the time I was about 10 years old. We used to go to St. Anne's Camp which, when I think about it now, I can't believe my parents allowed it or that we all survived it! Our counselors were all recent high school graduates with only one or two bona fide adults on site. There was a fast moving train that ran through the middle of the camp every day. We were all warned to watch ourselves around the tracks and that was pretty much the safety plan! We all did watch ourselves, though. We were terrified of those tracks because there was a rumour a previous camper was run over and died (to this day I don't know if it ever really happened). Safety concerns aside, these were some of the greatest days of summer. Our counselors were the coolest, and we spent our nights around campfires learning all the words to Billy Joel's Piano Man. During the days, we did things like ride a zip-line down a mountain, or play on the "soap slide," which was a giant plastic tarp that went down the side of a big hill covered in soap and water: we would fly down! We also had epic games of capture the flag that would last all day long. We had to "sing" for our supper – our table wouldn't be served unless we sang or did a skit. Good times.

When I was a little older (junior high and high school) I went to Université Sainte-Anne French Camp (not affiliated with the aforementioned Glace Bay St. Anne's Camp). It was a co-ed camp, so most of our time was spent figuring out which boys we were going to go to the end-of-the-week dance with, and then working on getting the chosen boy to ask! It was a wonderful opportunity to immerse ourselves in the language and I would learn as much French in that one week as I would the entire year preceding it. However... the rule of the camp was that you could NOT speak English and if you got caught you got an "avertissement" or warning. After three warnings you were out. I got two every single year, so the second half of my camp experience was always laced with anxiety over how my parents would react if I got kicked out and wasted their money on fees. So, although I was a pretty good kid, French Camp always made me feel like a rebel because I threw caution to the wind and whispered English with my friends. It took us a good three years to figure out we had a better chance of getting away with it if we spoke English but with a French inflection, so added an "eh" sound on the end of English words, and changed the tone of our English to have more of a French sound... we would throw in an occasional easy French word for good measure!



Jessica Lyle – McInnes Cooper: When our son Josh was six, freshly out of Grade Primary, he found himself a camp kid for the entire summer. I thought we had prepared him for every eventuality – we had snack and lunch strategies, suntan lotion strategies for excursions outside, and strategies for making new friends, and we'd discussed general camp etiquette. He transitioned to camp beautifully, so the first few weeks were smooth sailing and we were all pretty pleased with ourselves. But then it happened. We picked him up one day, and he was pretty down. We asked what was wrong, and quickly learned that he had been in some trouble that day. What happened, we prodded. "Why didn't you tell me what the middle finger means?" Well, we realized we had failed to prepare him for "real life," and one of his new "friends" tricked him into displaying his middle finger proudly to a couple of the camp counsellors. You can imagine the conversation that followed – and thus some of my son's innocence, at least in regard to swear words and their corresponding gestures, was promptly lost on that drive home. I hope some of you learn from this, and I wish all of you parents with new-to-camp-kids an incident-free summer!

Jim Rossiter – Department of Justice Canada: The Penguins were nobody’s favourite team when I was growing up in Orleans, in the east end of Ottawa, in the 1970s. They were fodder for our Canadiens.

I was 9 or 10. This was 1979 or 1980, summertime. Dad came home from the RCMP, from work, and said he signed me up for The Peter Lee Hockey School.

The what? The who?

It turns out Peter Lee was from Ottawa and had played for our major junior 67s, in the OHL. Wikipedia tells me that in 1975-76 Peter Lee set an OHL league record for career goals, a record that held for 33 years until a young John Tavares came along. Peter Lee went on to play 431 NHL games for the hapless Penguins.

How was it possible I’d never heard of Peter Lee? I can only explain by saying he wasn’t a Lafleur, Savard, Lemaire, Cournoyer, Lambert, Robinson, Dryden or even Mondou. So fixated were we on the Canadiens.

I’d been to camp camp but never hockey camp. Camp camp, Camp Woodland in the Ottawa Valley, was a lake and forest utopia for a kid from the suburbs: swimming, paddling, orienteering, tuck shop

(Freezies, Freezies, Freezies), capture the flag, bunk beds, musty sleeping bags, and no parents.

I have almost no memories of The Peter Lee Hockey School and none of Peter Lee. I asked Mom if she remembered it; she remembers my younger brother, Marc, then 7 or 8, getting mono the same week.

My enduring memory is the end, exiting the cold RA Centre for the Ottawa heat and a weekend of real camping, in a camper-trailer, with marshmallows, and Kool-Aid, and bugs.

The one memory that has stayed with me is that winter is for hockey, summer is for summer.



Derek M. Land– Blackburn English: I never attended a summer camp, but have many fond memories of the weeks when my friends attended them. Suddenly, after weeks spent playing tennis and ball hockey in the sweltering humidity of Southern Ontario, I would suddenly be afforded an uninterrupted string of mornings in the comfort of my parents’ air conditioned basement watching reruns of Family Ties. How I loved that show. For whatever reason, the episode about Alex’s job at the local grocery store stands out in my mind. Perhaps it was because the overlapping annual syndication schedules of the various channels dictated that I watch it at least

twice a year. The premise was that Alex attained a complete mastery of the operation of the small independent grocery store, to the great admiration of the kindly owner, but that his strong sense of ambition and devout capitalism drove him to accept a job in the cat toy division of the local superstore. I think it really showed the complexity of his character, as the generosity he’d reluctantly inherited from his parents struggled against his passion for money. Also clear in my mind were the two appearances of a young Tom Hanks as the troubled alcoholic Uncle Ned, and the time when Alex turned the house into a hotel to capitalize on homecoming weekend while his parents were away. I can

still hear Michael Gross’s voice in my head, suppressing his rage through gritted teeth “Alex, parents are conditioned to put up with a few minor accidents when they leave their children home alone. A broken vase, spilt milk on the rug....There was a kangaroo.... in my living room.”

Ah, summer camp. Good times.

Outside the Office is a recurring feature focusing on a lifestyle issue of interest to CBA members. Theresa Graham is an associate with Weldon McNinis in Dartmouth and a member of the editorial board of Nova Voce.

TAKE NOTICE

• The CBA–NS Annual General Meeting and President’s Reception will be held 5 – 7 pm, Thursday, August 7th, 2014 at the Marriott Harbourfront Hotel. Everyone is welcome to attend the meeting, 5 – 6 pm and the reception, 6 – 7 pm.

NOMINATING COMMITTEE REPORT 2014-15

PURSUANT TO the Canadian Bar Association - Nova Scotia By-Law 15(b), the Nominating Committee, comprised of Daniel A. MacRury, QC, Immediate Past-President and Committee Chair, Robyn L. Elliott, QC, President, David Cameron, Vice-President, and R. Lester Jesudason, Equity Committee Chair, submits the following Report for the election of Treasurer and Council Members for 2014-15:

1. The Committee nominates for the position of Treasurer, who shall be a voting member of National Council:

Dennis J. James, Truro

2. The Committee nominates the following persons to Council:

a) One (1) member representing Region 1 (Digby, Yarmouth, Shelburne, Queens, Annapolis, Hants, Kings and Lunenburg Counties), who shall be a voting member of National Council:

Terry Kelly, Kentville

b) Two (2) members representing Region 2 (Halifax Regional Municipality), who shall be voting members of National Council:

Susan MacKay, Halifax

Carrie E. Ricker, Halifax

c) One (1) member representing Region 3 (Colchester, Cumberland, Pictou, Guysborough and Antigonish Counties), who shall be a voting member of National Council:

Kimberley D. Pochini, Truro

d) One (1) member representing Region 4 (Inverness, Victoria, Cape Breton and Richmond Counties), who shall be a voting member of National Council:

Gail Rudderham Chernin, QC, Sydney

e) Two (2) Members-At-Large, who shall be voting members of National Council:

Annette M. Boucher, QC, Halifax

Robyn L. Elliott, QC, Halifax

f) Sixteen (16) Additional Members-At-Large, who shall sit as non-voting members of National Council:

Heather E. Burchill, Halifax

Bradley D.J. Proctor, Halifax

Peter Dostal, Halifax

Robert F. Risk, Sydney

Carol F. Gillies, QC, Antigonish

Hanaa Al Sharief, Halifax

David Hirtle, Lunenburg

Heidi G. Schedler, Halifax

Jonathan Hooper, Halifax

Terrance G. Sheppard, Dartmouth

Karen Hudson, QC, Halifax

Alan J. Stern, QC, Halifax

Adriana L. Meloni, Halifax

Jennifer Taylor, Halifax

Matthew Moir, Dartmouth

John S. Underhill, Halifax

AND TAKE NOTICE that if no alternative nominations are received at the office of the Executive Director by July 25, 2014, a single ballot will be cast at the Annual General Meeting on August 7, 2014, in favour of those named in the Report of the Nominating Committee set out above. (By-Law 15(e): an alternative nomination for any position mentioned in 15(b) may be made by any member in good standing of CBA-Nova Scotia if consented to in writing by the member nominated and if recommended in writing by at least five (5) members in good standing of CBA-Nova Scotia.) **NOTICE GIVEN BY:** Tina Tucker, Executive Director, June 27, 2014

to prove this. Dow Chemical disagrees on the scope of the settlement, viewing it as a global settlement, and argues that the evidence from the mediation session on which Bombardier seeks to rely in its motion for homologation is inadmissible by virtue of the confidentiality agreement.

A note on the common law / civil law distinction

Both settlement privilege and the proof of settlement exception apply in Quebec, so the settlement privilege analysis will be the same in the common-law jurisdictions. The contractual analysis may differ slightly, although Quebec's approach to contract interpretation, which focuses on the parties' intention, does not differ much from the common law.

Legal analysis

Union Carbide is a companion of sorts to the Supreme Court's 2013 decision in *Sable Offshore*. Justice Abella for the Court in *Sable Offshore* held that the amounts negotiated in three Pierringer Agreements, whereby the plaintiff had settled with some but not all of the defendants in multi-party litigation, were covered by settlement privilege and could not be disclosed to the non-settling defendants unless there was "a competing public interest outweigh[ing] the public interest in encouraging settlement." A competing public interest could include an allegation of misrepresentation, fraud, undue influence, or overcompensation of the plaintiff. As no such allegations existed in *Sable Offshore*, the defendants were not prejudiced by settlement privilege attaching to the amounts negotiated with their co-defendants. Justice Abella consistently emphasized that settlement privilege promotes settlement and furthers access to justice.

Justice Wagner picked up on this theme of promoting settlement in *Union Carbide*, explaining that the three components of his decision—settlement privilege as a class privilege; the proof of settlement exception; and provisions to ensure confidentiality in mediation—all share that same goal. But he cautioned against "conflating" settlement privilege and confidentiality provisions in mediation agreements:

...settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.

For example, the confidentiality clause would not have protected the discussions between counsel for Bombardier and Dow after the mediation session was over, but those conversations would still fall under the umbrella of settlement privilege.

And yet Justice Wagner found that parties could opt out of the more comprehensive protection of settlement privilege, along with

its exceptions – but, again, only on the clearest of terms:

Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear. It cannot be presumed that parties who have contracted for greater confidentiality in order to foster frank communications and thereby promote a settlement also intended to displace an exception to settlement privilege that serves the same purpose of promoting a settlement. Parties are free to do this, but they must do so clearly. To avoid a dispute over the terms of a settlement, they may also choose to stipulate that, to be valid, any settlement agreed to in the mediation must be immediately put into writing.

This was not done on the facts of *Union Carbide*: the mediation contract was a standard-form agreement, signed "on the eve of the mediation," containing no express provision that the parties were "renounc[ing] their right to prove the terms of the settlement." It would therefore appear difficult after *Union Carbide* to get around the proof of settlement exception, short of the parties expressly stating in their mediation agreement that they wish their contract to override it.

Other points of note

- Justice Wagner referred to Nova Scotia's *Commercial Mediation Act*, SNS 2005, c 36 in support of his conclusion that mediation communications can be admitted to prove settlement unless the contract specifies otherwise. This statute, along with Ontario's Act, was modelled after the United Nations Commission on International Trade Law's Model Law on International Commercial Conciliation: see section 6(1). It explicitly provides for information from an otherwise confidential mediation to be admitted in evidence "for the purposes of carrying out or enforcing a settlement agreement": see section 12(2)(b).
- *Union Carbide* leaves open the question of whether the mediator herself could be compelled to testify where proof of settlement is at issue.
- Finally, Justice Wagner recognized that parties litigating in this area may not want their mediation activities on the public record, and suggested they could make an application for a confidentiality order and an *in camera* hearing in accordance with the test from *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41. However, he stated: "In camera hearings such as this should be reserved for cases in which there is a genuine dispute about the scope of the confidentiality agreement."

Trending is a recurring feature focusing on a new development in the law. Jennifer Taylor is a research lawyer with Stewart McKelvey in Halifax and a member of the editorial board of Nova Voce.

CBA Nova Scotia would like to thank
the following organizers and speakers
for their exceptional contribution to:

LESSONS LEARNED, WISDOM SHARED
Women's Conference 2014

Congratulations to Past-President Jessica L. Lyle,
recipient of the Constance R. Glube Spirit Award



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