

SUDBURY DISTRICT LAW ASSOCIATION LEGAL BRIEFS NEWSLETTER NOVEMBER 2013

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MESSAGE FROM THE BENCH , ONTARIO COURT OF JUSTICE

First of all, allow me to bring Season's Greetings on behalf of the Ontario Court of Justice. 2013 has been another interesting and busy year for our court and 2014 is shaping up to be the same.

Unfortunately, 2014 will see the end of a long and distinguished career for the longest serving judge in the

Province of Ontario. In early July 2014, Justice Fitzgerald will be leaving the bench after serving for over 42 years!

To put that into perspective, most lawyers with 15 years or less experience were not even born when Justice Fitzgerald was appointed! Our court will never be the same without him. I thank him for his long years of service.

We are in the final stages of reviewing the Criminal Law Protocol for Sudbury and it will be available early next year. We have already implemented a few changes starting with the addition of a plea court every second Friday in Courtroom "E".

We have also put together a small committee which will be involved in setting up a Community Justice Court in Sudbury. This would be a Mental Health Court but it was thought that the term Community Justice Court may take away the stigma often attached to Mental Health Courts. It is proposed that the court would sit every second Friday from 9:30 a.m. to 11:00 a.m. in "E" Court, the same day as regular pleas are now taken; regular pleas would be taken starting at 11:00 a.m.

In the near future, we will also be reactivating the local bail committee and will be asking for input from your members.

Finally, I once again take this opportunity to invite you to get in contact with me to discuss any issues of interest to our court.

Martin Lambert
Regional Senior Justice
Ontario Court of Justice
Northeast Region

SUDBURY DISTRICT LAW ASSOCIATION INCORPORATED NOVEMBER 20TH 1923

AMONG THE FOUNDING MEMBERS: GEORGE E. BUCHANAN, K.C.; JEAN NOEL DESMARAIS; GEORGE JOSEPH VALIN;

CHARLES ALBERT RAICHE; GEORGE M. MILLER AND ROBERT RUSSELL MCKESSOCK

FROM KEEWATIN TO CHILCOTIN—
where raindrops and written words flow



The sign, coming as it did near the end of a full day's drive from Sault Ste. Marie to Atikokan, was the one that most caught my attention: "Arctic watershed—from here all waters flow north into the Arctic Ocean." Two other signs located just east and west of the watershed sign, also reminded me sharply where I was and where I would be paddling. They respectively read: - "Welcome to Treaty 3 traditional territory" - "Welcome to Atikokan - canoeing capital of Canada."



My Metis paddling partner looked a lot more rough than ready when we met on August 17, 2013, under the Atikokan Annual Bass Tournament beer tent. But the next day, as we both stepped into his 18 foot Souris River Wilderness kevlar canoe, he quickly demonstrated that he had indeed paddled solo from Rocky Mountain House in Alberta, to Montreal, Quebec, only two years earlier. Within minutes of leaving the Fort Francis town dock and heading east down the long stretch of Rainy Lake towards Lake Superior, I could feel his strength and determination.

Over the course of nine and a half days, through a great span of incredible late August weather, the Souris River canoe carried us 371 km, through more than twenty lakes, innumerable rivers and many portages, to within 50 km of the Grand Portage.

But it was on day nine after averaging 15,000 paddle strokes a day that we came to a place perhaps unlike any other in North America. Here, on the 200 metre portage between North Lake and South Lake along the International Boundary between Canada and the United States, we stood at a place where, depending on how the winds blew, a single drop of rain could flow east through the Pigeon River to Lake Superior and on to the Atlantic Ocean, north through the Arctic watershed to Lake Winnipeg and into James Bay, or south into the Mississippi River watershed and down to the Gulf of Mexico.

I couldn't help but appreciate that the lands and waters through which I had paddled and portaged during the previous nine days also bore not only geographical significance but as well, great historical and legal importance. For it was in these Treaty 3 lands and waters covering approximately 55,000 square miles that disputes between Ontario and Canada spawned both the 1884 Privy Council decision, wherein the 1878 Award of the Boundary Commission was affirmed and the 1888 decision in *St. Catherine's Milling and Lumber Company v. The Queen*. In the *St. Catherine's Milling* decision, the Privy Council struck down a federal timber licence, upheld Ontario's s. 109 constitutional claim and held that Ontario had exclusive power to authorize forestry on off-reserve Treaty 3 lands. But it was the words chosen by Lord Watson and the impact of those words on Aboriginal title that resonate to this day. The Report of the Royal Commission on Aboriginal Peoples (RCAP, 1996) put it this way:

Unfortunately, Canadian courts were unable or unwilling to incorporate the perspective of Aboriginal peoples within existing British and Canadian land law. Thus they simply adopted the 'discovery doctrine' discussed in earlier chapters, asserting that legal title and ultimate "ownership" of Aboriginal lands in North America either became vested in the Crown at the moment of discovery by British explorers, or passed from the "discovering" French king to the British Crown upon France's 1763 cession of its North American possessions to Great Britain. Under the discovery concept the newcomers thus became the "owners" in terms of their own legal framework. The original Aboriginal inhabitants who had been living on the land from time immemorial were found to have no real property interest in the land at all; rather, they had a mere "personal" and "usufructuary" right that constituted a burden on the Crown's otherwise absolute title.

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FROM KEEWATIN TO CHILCOTIN
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Little did I know on that portage trail that legal history might be revisited, if not rewritten, when shortly after my return I read that the Supreme Court of Canada had granted leave to appeal the decision of the Ontario Court of Appeal in *Keewatin v. Ontario (Natural Resources)*. Canada's highest court would in due course pronounce on legal issues of vital constitutional importance to Canada, Ontario and Treaty 3 First Nations.

Three weeks later, more by coincidence than by design, I found myself standing in the rain overlooking the Chilkoot Trail historical sign marker near the northern end of this famous trail. While I was not on traditional Tsilhqot'in Nation lands, I knew that this historical trail linking Skagway, Alaska to Carcross, Yukon took its name from the original peoples inhabiting the lands and waters in the west central interior of British Columbia.

As I reflected upon where the rains might flow from this point on their journey to the sea, I thought of the decades long legal struggle of the Tsilhqot'in people and of their epic 339 day court case, spanning five years, to secure declarations of Aboriginal title. Once again the doctrine of discovery and the words of the British Columbia Court of Appeal written in June of 2012 came to mind:

The basic concepts underlying claims of Aboriginal title and Aboriginal rights are straightforward. First Nations occupied the land that became Canada long before the arrival of Europeans. As the trial judge noted at para. 592, "Aboriginal nations were not recognized as nation states by the European nations colonizing North America." European explorers considered that by virtue of the "principle of discovery" they were at liberty to claim territory in North America on behalf of their sovereigns (see *Guerin v. The Queen* [1984] 2 S.C.R. 335 at 378). While it is difficult to rationalize that view from a modern perspective, the history is clear.

Only sixteen years earlier, in the 1996 RRCAP Report, the authors had stated:

Terra Nullius and the Doctrine of Discovery 1.16.2

Federal, provincial and territorial governments [should] further the process of renewal by

- a. acknowledging that concepts such as *terra nullius* and the doctrine of discovery are factually, legally and morally wrong;
- b. declaring that such concepts no longer form part of law making or policy development by Canadian governments;
- c. declaring that such concepts will not be the basis of arguments presented to the courts;
- d. committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation; and
- e. including a declaration to these ends in the new Royal Proclamation and its companion legislation.

October had now arrived and in Parry Sound District the fall colours were in full array. My paddling trip in northwestern Ontario and my trip to the Yukon were but fine memories. I checked the Supreme Court of Canada's fall schedule and determined that on November 7, 2013 the *Tsilhqot'in Nation v. British Columbia* case would be heard. As I set down my pen these words came immediately to mind:

Raindrops will flow where it is just natural that they flow

Legal words must flow where it is natural and just that they flow.

Justice Stephen O'Neill
Superior Court of Justice
Northeast Region

I COULDN'T BEAT OPRAH'S TIME

John Saftic



On Sunday October 27th, 2013 I ran the Washington Marine Corp Marathon in Washington DC. This was my eighth marathon. In my previous seven marathons, I was able to break the four hour barrier mark but it was not a good day for me in DC. The Washington Marine Corp Marathon is the third largest marathon in the United States, behind New York and Chicago. More than 30,000 people participated in the race and it was a beautiful, sunny day in Washington.

The race started in Arlington, Virginia at the Pentagon and then crossed into DC over the Potomac River. Prior to the start of the race a quick prayer was said for all of the runners, followed by ten marines parachuting onto the starting line carrying huge American flags. It was quite the sight. Before the cannon fired signaling the start of the race, the announcer proclaimed that the time to beat was 4:29.15. This was Oprah's time in 1994 when she completed the Marine Corp Marathon.

I am not making any excuses, but I was lame going into the race. I previously injured my right leg running a half marathon in Sudbury. My physical therapist advised me that I had severe shin-splints. After four sessions of therapy, she gave me the green light to run the race but advised me to take ibuprofen before and after the run.

A 26.2 mile run has never been easy for me but the Washington run was the most difficult to date. At the 13 mile marker I knew I was in trouble. I was tired and my leg was aching. Prior to the race, I was hoping to break 4 hours. I ran the first half in 2:07.58. My goal then changed to beating Oprah's time. As the race progressed, my pace decreased and I decided to enjoy the scenery as I knew that I could not finish faster than 4:29.15. Washington is a beautiful city and the run passed by the Washington Monument, the Jefferson Memorial, Martin Luther King Memorial, Franklin Roosevelt Memorial, the White House and the Capital Building. After a tour through Georgetown, the run returned to Arlington and finished at the Pentagon, just below the Marine Corp War Memorial, also know as Iwo Jima. My finishing time was 4:36.27. At the end of the race I joined up with other Sudbury runners and we had a few drinks and exchanged stories.

Although this was by far my slowest marathon to date, I was pleased that I finished and fought through the pain. Running is a great sport and it is also a great source of stress relief. The legal profession can be very stressful at time and running has helped over the years. In 2000, I joined the Sudbury Masters Club and have been running ever since. A fellow local lawyer; Dave Innes, introduced me to the club and a lunch hour run has become a part of my daily schedule.

I COULDN'T BEAT OPRAH'S TIME

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When I cannot run at lunch with the group, I run on a treadmill at work. In 2005, Michael O'Hara renovated the basement of Miller, Maki law offices and added a treadmill with a flat screen TV and a shower.

Over the years, members of the Sudbury legal community have participated in many marathons. Runners and their personal best times include the following:

- Justice Stephen O'Neill, SCJ 2:48:20 (Ottawa) 1987
- Peter Best, Peter Best Law 2:48:51 (Espanola) 1985
- David Innes Q.C. Desmarais, Keenan 3:28.11 (Ottawa) 1981
- John Saftic, Miller, Maki 3:31.59 (Ottawa) 2004
- Stacey Haner, Crown Attorney, District of Manitoulin 3:43.45 (Niagara Falls) 2006

- Laurene Farrell Weaver, Simmons 4:45.03 (Toronto) 2009
- Lise Perdue, Desmarais, Keenan 4:47.03 (Toronto) 2003
- Sylvie Guenette, Desmarais, Keenan 4:50.00 (Niagara Falls) 2010

On a final note, I did have a surprise meeting with former President Clinton while waiting for my flight back to Sudbury. Prior to departure there was an announcement that the flight would be delayed 5 minutes to allow the former president to be escorted to his limo. As the former president walked by with his entourage, I extended my hand and introduced myself. He stopped and chatted for a moment. One of his bodyguards took a picture for me. Although I didn't beat Oprah's time the Marine Corp Marathon in Washington DC is a trip I will never forget!

John R. Saftic

CAN I LEAVE THE COUNTRY?

Can I leave the country? We have a minor dated drug record. The answer is anywhere but the USA probably yes! USA probably no.

While the question is usually begun with "Do you have a criminal record?" Now, to a lawyer that refers to a conviction under the *Criminal Code of Canada*, otherwise one has no criminal record.

To the border authorities, the *Controlled Drugs and Substances Act*, if not other federal and provincial offences qualify. And, to those same US authorities, pardons and successfully completing a conditional sentence mean nothing. They may even treat a withdrawal, if you have signed a peace bond, as a "conviction."

The worst case I recently had was an elderly couple who owned a home in Florida where they attended for 6 months each year for the last 30 years. More than 30 years ago, the male spouse had a summary sexual assault conviction, no jail, 6 months successful probation.

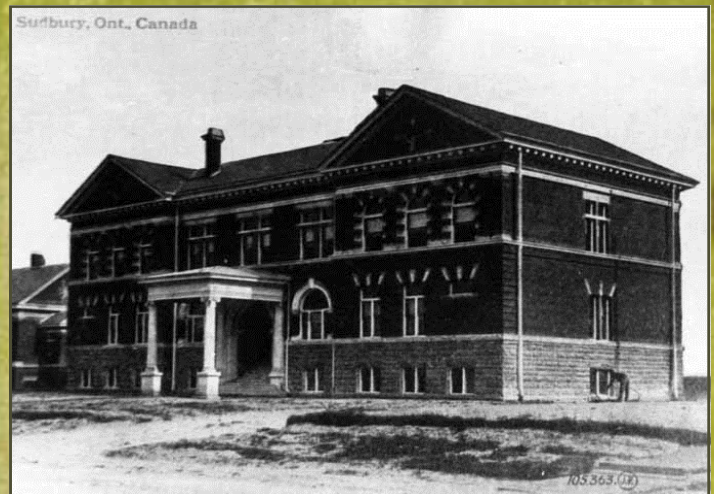
They were turned back in autumn 2012.

We jumped through endless hoops and sent fees to the USA for each stage of the proceedings. Final answer - "NO".

9/11 was the turning point. *The Patriot Act* and *Homeland Security* hurt, but the main problem was the need after 9/11 to hire 1200 new border guards. Much of the American population of 18 to 20 year olds were in Afghanistan or Iraq, so they scoured the high schools, minimally trained people and the last line of the training was "when in doubt, say NO."

As one of the University of Toronto students who burned Senator McCarthy (remember the Hollywood "blacklist") in effigy and got to the front page of the *Globe*, I don't even try anymore. Also, Cuba is warm.

Edward J. Conroy



SUDBURY COURT HOUSE CIRCA 1909

COLLOQUIUM 2013

Colloquium 2013 was a tremendous success, once again. In addition to the organizing committee, session leaders and speakers, the success of the program is a direct result of those of you who attended the conference.

It was over 5 years ago that a group met to discuss our ideas for a CPD program in Sudbury. At the time, the vision was for a conference that would not only involve education sessions but would also include an opportunity for members of the bar throughout Northeast Ontario to socialize in a collegial atmosphere. We also had a vision that the conference would be an event for lawyers throughout the region including Parry Sound, North Bay, Sault Ste. Marie, Timmins, Kapuskasing, Kirkland Lake, New Liskeard, Manitoulin Island and all points between. What we thought was that we could offer a quality program that would avoid the cost of having to travel to Toronto or watching a program on our computer. This year, we are pleased to report that 230 people registered for the conference. We had lawyers attending from each of these other communities truly making this a conference embraced throughout Northeast Ontario. This was a conference put on for the North, by the North, supplemented by some additional expertise from other parts of the Province. We thank all speakers who travelled to Sudbury.

Each year, we have tried to diversify the programs offered as part of the conference. This year, sessions were offered in Trial Advocacy, Criminal, Family, Real Estate, Negotiations, Practice Management, Estates, Civil, and a session for young lawyers. As we commence the planning process for Colloquium 2014 we invite any recommendations you might have with respect to programming for 2014.

The quality and affordability of the program is also a direct result of our sponsors. It is important to recognize our sponsors as they are a key part in the success of this program. Thank you to the following:

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This year we also had three key-note speakers. The lunch speaker on Thursday was Dean Lee Stuesser from Lakehead University Law School. We also had a number of volunteers working from Laurentian University's Law and Justice Program. It was quite encouraging to see so many of these students speaking with the Dean following the presentation. Some of those students may very well be attending Lakehead in the future and eventually practice in the North.

Mr. Justice Stephen Goudge from the Ontario Court of Appeal spoke Thursday evening. I heard a number of lawyers comment on how he renewed their sense of professionalism and enthusiasm for the practice of law. At times, that can be challenging.

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COLLOQUIUM 2013

I am also pleased to report that, once again, the hospitality suite was a rousing success. Thank you to James Ross and J. M. Bray for their wine selection which was impeccable. A number of lawyers from outside our region commented on how impressed they were with the collegiality amongst our bar. It is a tradition that hopefully will continue, thanks to the SDLA, who sponsors the evening.

Colloquium 2014 has been booked for **October 16th and 17th, 2014**. Please mark your calendars now. Unfortunately the program falls in the midst of hunting season but hopefully we can entice those of you who would otherwise be in the bush to come out to the conference, at least for a day.

Planning for next year's conference will start again in early 2014. If there is anyone who is interested in becoming involved with the organizing committee or working as a session leader, please contact me at shawl@millermaki.com.

It has been a tremendously rewarding experience to have been part of the planning and organizing of this conference. Personally, I want to extend a thank you to Ms. Carrie Regenstreif who was hired by the Sudbury District Law Association to coordinate the program. Her hard work was invaluable.

Lastly, please ensure you go on-line at the LSUC website to register your CPD hours.

Lucille Shaw
Organizing Committee

THANKS FOR YOUR SUPPORT!

With the conclusion of the Third Annual Northeast Continuing Professional Development Conference, the SDLA would like to extend a huge thank you to all of the sponsors, volunteers, and participants who came together to make the Colloquium 2013 an outstanding event! In particular, we would like to thank the Conference Chair, Lucille Shaw, and to the following members of the Planning Committee: Justice Patricia Hennessy, Sheena Alexander, Gerald Brouillette, Erin Cullin, Carrie Regenstreif, James Ross and Kathleen Stokes.

The SDLA would also like to extend a warm thank you to Session Chairs for their fantastic contribution to this year's sessions: Lisa Barazzutti, Erin Cullin, Carol Hartman, Linda Laakso, Geoffrey Larmer, Jackie McGaughey-Ward, Tomm Orendorff, James Ross, Ian Sinclair, Kathleen Stokes, Wayne Stickland, Terry Waltenbury, Philip Zylberberg and Jennifer Campbell.

Last but not least, we would like to thank the speakers and participants. Without you, Colloquium 2013 would not have been a great success!

COLLOQUIUM 2014 OCTOBER 16TH AND 17TH 2014

CAPTIVATED, STAR-STRUCK: ABORIGINAL YOUTH GET EXCLUSIVE PEEK INTO THE LIFE OF JUSTICE SINCLAIR



SUDBURY, ON: Aboriginal students from a number of First Nations around Sudbury-Manitoulin, including Wikwemikong, M'Chigeeng, Sagamok, among others, gathered for a first ever round table discussion with key justice stakeholders in Sudbury, on Friday, October 18th, 2013. With iPhone cameras flashing relentlessly, one celebrity in particular captivated their attention: Justice Murray Sinclair, the Chair of the Truth and Reconciliation Commission of Canada and judge of the Court of the Queen's Bench of Manitoba.

Roughly 35 Aboriginal youth participated in the event, with representation from Manitoulin Secondary School, Kenjegin Teg Institute, St. Charles College, Sudbury Secondary School, Espanola High School, and the University of Sudbury. Star-struck, the students sat in awe as they took turns asking questions and snapping photos with renowned Aboriginal justice leader Justice Sinclair. The session was moderated by Justice Patricia Hennessy of the Superior Court of Justice, who acted as a facilitator

along with Superior Court of Justice Stephen O'Neill, Espanola Secondary Aboriginal Counsellor Gordon Waindubence, and Aboriginal bar advocates, Susan Hare and Patrick Nadjiwan.

The purpose of the event was to engage Aboriginal youth in the regions and open dialogue on recent topics in Aboriginal justice. The students broke into groups of 8-10 to grapple with timely issues such as First Nations' representation, the role of the police in Aboriginal communities, systematic discrimination and the interaction between the Canadian justice system and traditional Aboriginal approaches to conflict resolution. The students then attended lunch with the members of the Bar of Northeastern Ontario at the annual Continuing Professional Legal Education conference, where Justice Murray Sinclair delivered a powerful speech on the legacy of residential schools and the Truth and Reconciliation Commission of Canada.

**TO LEARN MORE ABOUT THIS SYMPOSIUM AND FUTURE EVENTS, PLEASE CONTACT:
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