

# Reflections on Half a Century in the Commercial Litigation Trenches: Part III

April 22, 2021

By and Bryan Finlay KC

*Click here to read [Part I](#) and [Part II](#).*

## **The Department of Justice in Ottawa:**

With Peter Hogg's "Constitutional Law of Canada" in hand, I was ready to continue my career as a Justice lawyer in Ottawa. Before this job, I had always worked in a small to medium size law firm. This was my first experience working in a large bureaucracy, and it changed the way I practised, at least temporarily. In the Department, certainly in the area in which I worked, the staff did not work overtime. Instead, like clockwork, the floor emptied of staff at 5PM. As a result, I had to change the way I worked. For example, I had to work after hours to make sure all the drafts were ready for the staff to type them up at 9AM the next day. This was long before computers.

The lawyers in my area were welcoming and friendly. The head of the group was an exceptional lawyer, Morris Rosenberg, who went on to rise through the ranks to the very top of the civil service. There were lawyers within the Department whom I found to be the best public servants: excellent lawyers who in their dealings with the client departments exhibited professional independence and the very finest dedication to working in the public interest.

When I appeared in court on behalf of the Attorney General of Canada, I must admit to a certain tingle of pride going up my spine.

My family and I had rented a post-war, "prefab" house in Rockcliffe Park, where many diplomatic missions were located, and just across from the Israeli ambassador's home. The main feature in our house was that the insulation was so bad that throughout the cold and snowy Ottawa winters, our little property was forever green because the furnace roared full-time. And boy did it get cold in winter. Our children got pneumonia. I bought a parka that could withstand the most extreme cold at -40°F, and I sure needed it. We lived at the bottom of the hill and every morning I would climb up with a large document bag to catch the bus at the top of the hill.

Justice Estey of the Supreme Court lived just a few houses away from us. He would drive to work in the morning and would pass me in a whirlwind of snow. One day, he stopped and asked, "Bryan, can I give you a lift?". I gladly accepted his offer. After I got in his car and we had exchanged pleasantries, Justice Estey said he would be pleased to give me a lift each morning to work on one condition: I was not to disclose to anyone what we talked about in the car. I agreed. From that moment on, I enjoyed the privilege of being driven to work by Justice Estey and listening to his many wonderful stories.

Justice Estey was a raconteur. I have often wondered where the storytelling excellence of many of our senior counsel came from. I now conclude that perhaps, in part, it's from the train rides and hotel stays when lawyers travelled to and from the assizes. Wonderful occasions for storytelling.

The cases that we litigated in Ottawa were of a different order than I had experienced in Toronto. Many of them were cases we would have killed for in Toronto, and they were provided here as a matter of everyday work.

I had been brought up to believe that the "general counsel" was the highest level of litigation accomplishment. The general counsel was retained to do the most difficult tax, estate, public law and commercial cases. Such counsel would bring the generalist skills to each specialty, and by doing so, would be able to articulate in a winning fashion, albeit supported by the specialist experts, the winning argument. This conceit was destroyed for me in Ottawa. What destroyed it was the costing inquiry into the telecommunications industry. Here, the thought that the generalist could master any specialized area was obliterated, at least for me. I was to appear for the Director under the Competition Act in such a costing inquiry. No matter how much time I spent, the issues and language in that industry forever eluded me. I have never been more scared than when I was to cross-examine a senior executive. I frankly did not understand a thing that was being said or even the questions that I would be asking. I lay awake most of the night before the cross examination wondering how this was all going to end... most likely in utter humiliation. Perhaps I might be struck by a sudden illness and escape the ordeal. I said goodbye to my wife as I left for the office feeling that I might never see her again. Only through the grace of God did I survive.

In the course of one case in Ottawa, I met Gordon Henderson, the Dean of the Ottawa Bar, who appeared on the opposite side of me in the courtroom. He was a giant in the profession. He must have been in his early 70s when our paths crossed. I will always remember him coming into court before we started and swirling around, his gown flying out around him. Mr. Henderson said to me, "How do you like it... my new gown...It's brand new. I've just bought it, don't you think it's magnificent?" Everyone in the court agreed that he was resplendent in his new attire. At the time I thought to myself, "Gordon, could you not have just made your old gown last a bit longer?" With his new gown, he was now properly dressed for the next 30 years. The optimism of members of our profession never ceases to amaze me.

Let me end our Ottawa experience with a story that could only take place in Ottawa. As I said, our house was right across from the Israeli ambassador's home. Carol had just left with the children for a holiday. I was in court one more day to finish up a matter and would follow her the next day with our family dog. After the day in court, I came home, walked the dog and being very tired went to bed. The next thing I remember was a flashlight in my face and the voice from behind the flashlight saying who are you? When I became conscious, I asked "who are you?" It turned out it was the RCMP with a member of the Israeli secret service. They told me that strange noises had been heard coming from our home and they were investigating. Apparently, our dog had somehow got into the basement, was unable to get out and was howling. This had worried the Israelis. After a long day in court and only in Ottawa...

Back to Toronto.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

For more information or inquiries:

Toronto

Email:

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

**Toronto Office**

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110  
Fax: 416.365.1876

**Oakville Office**

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110  
Fax: 905.829.2035