



# THE ADVOCATES' JOURNAL





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# Thomas G. Heintzman, OC, QC: Life at full speed

William C. McDowell

On November 24, 2019, 900 people congregated at Upper Canada College at the memorial service for Tom Heintzman, QC, who had passed away on October 24.

From his second year at the bar, Tom Heintzman worked on many cases with George Finlayson, QC.<sup>1</sup> Colleagues knew Finlayson to be a brilliant and intense counsel, blessed with a volcanic temper. In 1982, acting for McDonnell Douglas in the Court of Appeal, Finlayson concluded his argument for the appellant. As was then the custom, the president of the panel asked whether junior counsel had anything to say. The convention equally contemplated that junior counsel would rise and say, “No, thank you.” But in this case, Heintzman rose and replied, “Thank you, My Lord. I do have some submissions, because I believe that Mr. Finlayson has missed an important point,” and carried on. Whether mischievously or not, the court accepted Heintzman’s argument as the basis for its judgment. George Finlayson told this story to great amusement at a tribute for Heintzman in 2002. Older members of the firm remembered that at the time it was not funny, really. Finlayson had caused associate lawyers to be fired for less serious offences.

Heintzman continued to refine his interventions in Finlayson’s advocacy as the years progressed. For two years beginning in 1978 Finlayson, Heintzman and a newly called lawyer, David Hamer, took up residence in St. John’s to act for Hydro-Québec to prevent the Government of Newfoundland invalidating long-term electricity supply contracts entered into by the Joey Smallwood regime. The contracts guaranteed to Quebec cheap electricity in perpetuity from the Churchill Falls project in Labrador. The Hydro-Québec team followed a punishing working schedule, led by Heintzman. Hamer recalls that Heintzman adopted a daily practice of running up Signal Hill from the team’s base camp at the Battery Hotel. They worked late into the evenings, but there were warm relations among counsel on all sides. The Montreal lawyers acting for the Government of Quebec nicknamed Heintzman “Tigger.”

After 88 days of trial, Finlayson and Heintzman agreed to divide the closing arguments. When Finlayson concluded, Heintzman began his arguments with a “few preliminary observations” about senior counsel’s submissions. Hamer recalls that after a few minutes Finlayson rose and left the courtroom, muttering on his way out, “That son of a bitch is trampling through my territory.” Senior counsel remained in the Duckworth Street law library, sulking like Achilles in his tent until Heintzman had concluded.

Newfoundland had issued a statutory lease to the Churchill Falls Company (CFL Co.), which gave it the right to exploit the Churchill River (formerly Hamilton River) for power generation. CFL Co. in turn sold its power in virtual perpetuity to Hydro-Québec.



Newfoundland attempted to “recall” the power by a 1976 order in council that provided in part that Churchill Falls enjoyed “the right to transmit throughout the Province any electric power generated as a result of the harnessing of the whole or any part of the Upper Churchill River and to export from the Province such power: Provided that upon the request of the Government consumers of electricity in the Province [Newfoundland] shall be given priority where it is feasible and economic to do so” [emphasis added].

The parties spent many days at trial on technical evidence concerning whether it could ever be “feasible and economic” to import electricity from Labrador to Newfoundland. In the end, Heintzman contrived an argument interpreting the word “priority” in a way that allowed Hydro-Québec to be granted its declaration. The trial judge agreed with Heintzman that while Newfoundland might have a priority under the regulation, the electricity which had

already been agreed to be sold to Quebec was excluded from consideration.

Notwithstanding that they were playing away from home, Finlayson and Heintzman succeeded in their efforts for Hydro-Québec at all three levels of Court. Heintzman's work in the historic case made it clear that he belonged in the top tier of Canadian counsel.

Thomas Giles Heintzman was born on May 16, 1941. His father, George, was the president of Heintzman & Co., which then had a large piano manufacturing plant on Heintzman Street in the West Toronto suburb. Family lore had it that the founder, Theodor August Heintzman, had learned his craft with Henry E. Steinway at the same Berlin piano factory before each left Europe for North America. Tommy, as he seems to have been universally known in his youth, was an excellent student at Upper Canada College. He was also musically gifted, perhaps not surprising given the family business. At school he and several friends formed a jazz quartet, The Kollege Kats.

Tom would have been annoyed that his *Globe and Mail* obituary mentioned only his musical hobby. Although on the small side, he was a key member of the varsity hockey team at UCC. In the 1959 team photo, he can be seen beaming optimistically from the second row. One of his teammates was Brian Conacher, later a key member of the 1967 Leafs team that won the Stanley Cup.

Heintzman's academic achievements and hockey skills won him entry to Harvard. There, he played as a reliable defensive forward. He struck up a friendship with David Johnston,<sup>2</sup> a hockey teammate from Sault Ste. Marie. They remained close friends for the rest of Tom's life. At Heintzman's memorial service, Johnston recalled Tom's dogged play as a defensive forward. When Tom was diagnosed with cancer in 2017, Johnston organized a trip of his Harvard teammates to visit him at his home in Toronto.

From Harvard, Tom entered Osgoode Hall Law School. Following graduation, he spent a year at the London School of Economics, where he earned an LL.M. On his return to Canada he was hired as an articling student by Osler Hoskin & Harcourt, and he returned to the firm on his call to the bar in 1968. After one year, he moved to McCarthy & McCarthy to join its litigation department.

Tom was a precocious talent, and not plagued by self-doubt. Early in his career, Heintzman and his wife, Mary Jane, bought a house in North Toronto. When the Heintzmans took possession of the house, they noticed that the chandelier was missing

from the dining room. This would not do. Heintzman began a District Court action for the return of the fixture. He won. Nevertheless, the episode raised eyebrows at the firm because the unhappy defendant was a very senior executive of Noranda, a long-standing McCarthys client.

From the beginning Heintzman focused on commercial litigation. Unlike most of the other McCarthys lawyers of his generation, he had no interest in joining the firm's medical defence practice. (There was a story about Tom's early forays into malpractice litigation. The case involved an apparently botched hand surgery. At the examination for discovery, Tom said, "I want to see this" and reached across the table to grab the injured hand of the startled plaintiff.)

Gradually, his frontiers expanded. The 1991 edition of the McCarthy Tétrault directory announced his "Areas of Specialization" as Directors & Officers' Liability; Securities; Constitutional Law and Charter of Rights; Environmental Assessment; Administrative and Regulatory Law; Products Liability; Professional Malpractice; Construction; Assessment and Tax Appeals; and Broadcasting and Telecommunications.

Some of these claims of speciality were more credible than others. Years later, federal lawyers continued to chuckle over Heintzman's constitutional submissions in the margarine wars cases,<sup>3</sup> where he had claimed that a statutory requirement that margarine be coloured with yellow dye was a violation of the producers' freedom of expression. This, he maintained, was tantamount to interfering with the paintings of Van Gogh. Several years later, Heintzman argued unsuccessfully that, by denying Alcan the right to sell aluminum soft drink cans, the provincial government had infringed the company's Charter rights to security of the person and equality.

Following on from the Hydro-Québec litigation, Heintzman was in high demand to lead important cases. He argued successfully for protection of the right of the CRTC to impose conditions on a broad basis requiring television networks to carry a specified amount of Canadian content.

Inevitably, Heintzman became involved in the titanic fight for control of the Global Television Network. The principals of the Global Television Network had a falling out, and litigation was commenced in Manitoba. Two of the principals, Paul Morton and Seymour Epstein, claimed that the third, Israel (Izzy) Asper, had entered into an agreement to sell majority ownership of the network

to them. To complicate matters, a law firm merger allowed Morton and Epstein to obtain a ruling requiring Asper to find new counsel. Heintzman entered the fray on behalf of the Canwest Group and Asper in January 1988. Mark Freiman, Heintzman's junior, moved house to Winnipeg to work with Heintzman. "Tom worked 24 hours a day on the case," Freiman recalled. Ultimately, a court-sanctioned auction was held in which Asper assumed control of the Global empire.

In 1998, Heintzman was one of the phalanx of lawyers involved in litigation arising from the attempted hostile takeover of the venerable Schneider Corporation. The litigation was expedited and compressed into one week by Justice James Farley, an early commandant of the Commercial List. Given the "real time" exigencies, Paul Steep of McCarthys conducted the in-court cross-examinations, while Heintzman remained at the office generating the factum. Steep recalls that Heintzman's absence from the courtroom created some funny moments. "We were working until midnight every night. Midweek Tom asked, 'What about this argument?' and I advised him it wouldn't fly given the evidence that day." The next evening, Heintzman – dishevelled and glasses askew – announced that he had thought of yet another argument. "But Tom," Steep protested, "That's the same argument that wouldn't work last night at midnight." "Right," said Heintzman, happily scratching page upon page from the running draft.

Heintzman also acted for individuals in need of good counsel. Famously, following the collapse of Nortel in 2009, he shepherded Frank Dunn, the former CEO of Nortel, through a tortured series of civil and regulatory proceedings. The stakes were high and his client was vilified, particularly by Canadian pensioners.

Dunn and other executives were also the subject of criminal charges. When investigators learned that Heintzman and a colleague had attended meetings with Dunn and his US counsel, the Crown sought and obtained a ruling permitting it cross-examination of Heintzman in criminal proceedings. This effort proved to be pointless. Tom, like most advocates, was a terrible witness.

Earlier, in a less celebrated case, he appeared in the Provincial Court of Newfoundland at Corner Brook to defend the interests of a Greenpeace environmentalist, Patrick Moore, who had privately prosecuted a sealing captain, Morrissey Johnson, for the arcane offence of harvesting

seals on a Sunday. Hamer recalls that Tom had to endure both the weather and the magistrate, who insisted on calling him "Mr. Hentzleman." The defendant sealer secured an order of prohibition and the matter ultimately found its way to the Newfoundland Court of Appeal,<sup>4</sup> which dismissed Tom's appeal in a terse judgment. Chief Justice Furlong said of Heintzman's efforts: "I recognize the strength of this argument but in the matter before us I think it is too facile." Sealing was a way of life, and in this case home ice was home ice.

In another case, Heintzman acted tirelessly, and pro bono, to seek disability benefits for a Bay Street lawyer whose alcoholism had driven him from practice;<sup>5</sup> in another he defended the rights of the owner of the Prince Rupert Hotel, a rooming house, to resist its demolition following a devastating fire.<sup>6</sup>

Working with Heintzman could be exhilarating. He loved assembling teams to attack complicated evidence and craft legal theories. In commissioning document review and legal research, he lived by Oscar Wilde's maxim, "Nothing succeeds like excess."

To be part of this environment replicated the feeling of arriving early to the cacophony of symphony musicians tuning up. When the curtain rose, Heintzman and his teams usually produced beautiful music. But working with Heintzman was also to be "caught in a vortex"; the experience carried personal costs. His cases were usually massive "hundred boxers," and he demanded temporary exclusivity over the time of junior colleagues who worked with him. Often he commissioned research or document review only to decide after a good night's sleep that the need had passed. Hamer recalls working until midnight at the Memorial University library on a number of occasions, only to be told by Heintzman the next morning that there was really no longer any point in the memorandum he had produced. Mark Freiman observed that "Perhaps only one of five or one of six of Tom's ideas ever amounted to anything. But that usually was one more than the other side had. And the remarkable thing is that he was having all this research done manually, not when an articling student could punch a search term into Westlaw or Google and come up with an answer." For many years, McCarthys lawyers announced, as a weekend or holiday approached, "I've been Heintzmanized." This was on the face of things a gloomy statement, but it was also said with pride. It felt good to have Tom rely on your work.

Decades later, many remember Heintzman's advocacy on behalf of Kenneth Haggerty as the height of his relentless advocacy and sense of justice.<sup>7</sup> Haggerty had spent four years working with the real estate mogul (and later publisher) Avie Bennett in the development of shopping centres across the country. In the spring of 1988 Haggerty ended his association with Bennett. They had entered an imperfect contract. Haggerty maintained that the formula in his contract with Bennett entitled him to receive five times the previous year's earnings. Heintzman and his experts urged that Haggerty and Bennett had agreed to just such a value-added contract. Although the \$29 million Haggerty sought was a lot of money, Bennett had signed the contract with open eyes.

The trial lasted for 43 days. The formidable Earl Cherniak defended for Bennett and his companies. Heintzman's junior, Bill Black, recalls that Tom was so animated on several occasions, he pursued Cherniak at close proximity in the gowning room to tear into him about some document production issue or other that had happened in court that day. Cherniak maintains that Heintzman had to apologize to him in open court on three separate occasions. Even 30 years on, there is a difference of view as to the result of the

case. Cherniak holds that Bennett won on all issues; Black regards the result as a saw-off.

Heintzman's Tiggerish energy was by no means deployed only in the practice of law. He served for many years as a governor, and then chair, of the board at Upper Canada College. He was one of the founders of Camp Oochigeas, which allows young cancer patients to spend time in the wilderness. His contributions to the community were recognized when he was appointed Officer of the Order of Canada in 1998.

In 1994-95 he served as president of the Canadian Bar Association, travelling the country while practising full time (and overcoming prostate cancer). He acted as a director of the National Youth Orchestra. Fortunately for the legal profession, he became a bencher of the Law Society in 2003. Almost immediately, Heintzman championed the cause of governance reform. This was greeted with some bewilderment – surely a governor of UCC and member of the Toronto Golf Club was a reliable voice for the status quo.

Convocation was then an august, if ossified, body. Benchers could, and did, serve an unlimited number of terms. As a result, incumbents enjoyed a considerable advantage in bencher elections. Any bencher who won elections four times was anointed a life bencher and could participate in Convocation. There was scant diversity. Heintzman chaired the Governance Task Force and set out to modernize the system. With the urging of his committee colleague Linda Rothstein, he invited the broader profession to see mustier corners of the Society and gained popular support for the proposed changes. Heintzman noted dryly: "While lawyers and society at large may have accepted in 1910 that a large proportion of the governors of the Society be unelected senior members of the judiciary, government and the legal profession, the Task Force is of

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the view that this does not reflect the current view ....” With much grumbling, the benchers voted for significant reform. On December 4, 2009, Convocation adopted term limits and agreed to phase out life bencher status.

The Heintzmans enjoyed an active political life as lifelong Liberals. They had worked together in the 1960s election campaigns of Mitchell Sharp in the downtown Toronto riding of Eglinton. In the 1980s and 1990s, Tom believed fervently that Quebec had to be welcomed into the Canadian constitutional fold after the sharp divisions with René Lévesque and his government at the time of patriation in 1981. Tom and Mary Jane campaigned hard for the Charlottetown Accord when it was placed before the country in a referendum in 1992. They established a hotline at their Rosedale home to answer questions from Canadians about the implications of the accord. Mark Freiman, who was then working for Ontario Attorney General Ian Scott, recalls that Heintzman was in frequent contact to press his point of view. The Heintzmans devoted considerable resources to the production of bilingual bumper stickers proclaiming: “MY CANADA INCLUDES QUEBEC/MON CANADA COMPREND LE QUÉBEC.” But it all came to nothing on the evening of October 26, 1992. Canadians rejected the Accord 54 to 46 percent. Heintzman took solace that at least he had narrowly won the vote in Ontario.

Tom and Mary Jane had better luck in the 1995 Secession Referendum in Quebec. Like many other Bay Street individuals, they contributed personal resources to pay for school buses to transport Canadians from Toronto and more far-flung points to Montreal for the giant unity rally on October 27, 1995. Heintzman was overwhelmed with relief when the Yes side narrowly lost the vote.

Tom Heintzman “retired” from McCarthys in 2012. He immediately established himself as an arbitrator. While he took on some significant commercial arbitrations, he focused his efforts on adjudicating construction disputes. For those who had been his McCarthys colleagues through the years, it was striking to see him honoured after his death by the construction bar as one of its own. In 1977, Heintzman and Immanuel Goldsmith had written the authoritative *Canadian Building Contracts*, which is now in its fifth edition. Tom was a superb arbitrator who took the role as a neutral extremely seriously. His former colleagues could no longer buy him coffee, never mind dinner. He supplemented his efforts as an arbitrator/mediator by writing extensive case comments and papers relating to issues that arose in the construction industry.

Tom took his cancer diagnosis in stride when he learned the news in late 2016. Through the winter, he made the rounds of some of his friends in the profession to tell them calmly that he was suffering from late-stage colon cancer. I was part of one of those meetings, together with the five former McCarthys partners who had split off to form a new litigation boutique in 1992. Tom thanked us all for our friendship and reminisced about some of the old times. He was open about his illness and his fear of the uncertainty that he faced. We all told him that he would make it through this. It seemed a safe bet. To everyone who knew him, he was indomitable.

And, for a long time, that seemed to be right. One would hear dire things about Tom’s prognosis. But there he would be, walking up Yonge Street, or at an awards dinner, or bounding down the touchline at his grandson’s UCC rugby game and demanding to know more about the rules. When conventional oncology treatments had run their course, Tom became involved in a series of clinical trials. He retained his optimism and his extraordinary energy. He took his extended family on a trip to Italy. He continued


to work on the latest edition of his textbook.

Some months before his passing, Tom was looking forward to attending a small dinner at which his Harvard classmate, Professor Laurence Tribe, was to discuss his most recent book, *To End A Presidency: The Power Of Impeachment*.<sup>8</sup> There were all the interesting historical precedents which provided the context; Tom was also interested in Tribe’s refinement of the legal tests. But, he said, you need to be concerned about the structural damage to the United States in the event of a successful impeachment and trial of the president. You couldn’t just look at the near term, the effects that were clearly in view.

As I write this last bit, our country is in its eighth week of a comprehensive lockdown. Warm weather beckons. A Canadian summer is short, and we are all becoming restless and armchair epidemiologists among us argue about the R-naught number, the doubling time and whether reopening the economy will permit the development of herd immunity.

Governments now contend with hard choices: finding where the tipping point lies when the health risks of a continued lockdown -- a deep despondency, an economic depression and the failure of much of the social safety network -- might be greater than accepting a continuing monthly death toll, largely confined to the elderly and those with serious underlying health conditions. Can a just society accept that the costs will fall disproportionately on these groups in the name of the greater good?

More questions lie over the horizon. Should there be a guaranteed basic income for all Canadians? Should the country risk a flight of capital which might come with a grossly higher marginal tax rate? Should Canada strive to create not only equitable chances of success, but real substantial equality for its citizens?

Never have we missed Tom’s mind, perspective and voice more. 

#### Notes

1. Later, the Honourable Justice George Finlayson of the Court of Appeal for Ontario.
2. The Right Honourable David Johnston, later president of McGill University and the University of Waterloo and Canada’s 71st Governor General.
3. *Institute of Edible Oil Foods v Ontario*, (1989) 71 OR (2d) 158 (CA).
4. *Johnson v Seabright*, 1979 CarswellNfld 192 (CA).
5. *Green v Constellation Assurance Company*, [1993] OJ No 1445 (General Division).
6. *DaSilva v Toronto*, 1991 CarswellOnt 524 (GenDiv).
7. *First Plazas Inc v Theropoda* 1991 CarswellOnt 1857.
8. New York: Basic Books, 2018.