

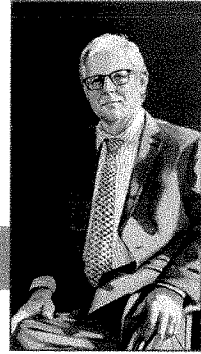
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ON THE FRONT COVER



JOSEPH J. ARVAY, Q.C.

By Catherine Bois Parker and Murray Rankin

Joseph J. Arvey, Q.C., has never let a binding precedent get in the way of a good argument. He has great respect for the law—but in his mind, the weight of authority is only as powerful as its ability to promote justice. And if the authority cannot be improved, Joe will simply work harder to find the right evidence that has never found its way to a court before. As a result, Joe's advocacy can take courts, opposing counsel and those who work with him to places they have not really been before. It is always interesting. And often it is ground-breaking. When Joe led a talented team of lawyers to persuade a unanimous Supreme Court of Canada that the right to die with dignity deserved constitutional protection, he achieved something truly remarkable. But in many ways, that is just what we have come to expect from him.

For someone who has made such a contribution to British Columbia, it must be acknowledged from the outset that Joe is a transplanted Ontarian, with Hungarian and Italian roots. He grew up in Welland, Ontario and does not come from a privileged background. He often talks about his cousin Vincie and the immigrant experience.

As a child Joe's lively and mischievous nature got him into trouble more than once. Even then, however, he was quite adept at making his case. His Uncle Aldo would tell Joe that he was "slicing the bologna pretty thin" when he tried to explain away his exploits. (Many judges may feel the same way now about some of the fine distinctions Joe draws in his arguments.) Nevertheless, there was a broad recognition among his friends that Joe was very, very good at arguing. That, and his admiration for Perry Mason, made law school the natural choice.

In his first year of university, in 1969, Joe was in a car accident that left him a paraplegic. It changed the way he saw the world, since he suddenly became a member of a minority group. He learned about facing obstacles that are invisible to the majority, and he experienced discrimination and prejudice first hand for the first time. Joe's passion for representing the interest of minority groups, and the great empathy he feels for his clients' causes, are deeply grounded in his own experiences. He has enormous interest in and patience for listening to his clients' stories, because he has learned that a different perspective can change so much about how the world is understood and experienced.

But it must also be said that the one thing Joe cannot abide is being told that he cannot do something. His Uncle Aldo no doubt thought him stubborn, but now we call it determination, and in Joe, it is spiked with a very strong dose of courage. Joe has, steadfastly through his life, refused to accept limitations imposed upon his ambitions. Obstacles became challenges to meet. And so his disability did not interfere with him sailing solo to circumnavigate Vancouver Island or conquering Whistler as the first sit-skier or travelling into the wilderness to find the best fishing. And when you have the fortitude to overcome barriers like that everyday, what's to worry about overturning a court decision or making new law?

Joe earned his first law degree at the University of Western Ontario. He was called to the Ontario bar in 1977. He pursued graduate studies at Harvard University where he earned his master of laws degree. He was in the same class as Peter Gall, Q.C., and Madam Justice Mary Newbury. We do not know what was in the water in Cambridge, Massachusetts that year but all three are famous for not only their intellects but also their appetites for hard work.

After returning to Canada, Joe taught law at the University of Windsor Faculty of Law before he moved to British Columbia to work in the constitutional and administrative law division of the Ministry of the Attorney General. That was 1981, one year before the *Canadian Charter of Rights and Freedoms* came into force. In 1987 Joe was named Queen's Counsel, one of the youngest in recent memory. In 1990 he entered private practice and co-founded the firm of Arvay Finlay with the late John Finlay, a celebrated litigation lawyer who hailed from McCarthy Tétrault in Toronto, and Murray Rankin. Joe is currently a partner at Farris, Vaughan, Wills & Murphy in Vancouver.

Joe has earned many awards including the Walter S. Tarnopolsky Human Rights Award, the Trial Lawyers Association of British Columbia Bar Award, the Robert S. Litvack Award for exceptional public interest

work and outstanding lifetime achievement, and the Advocates' Society's Award of Justice.

His career is a remarkable one. He has appeared before the Supreme Court of Canada over 70 times and has been instrumental in shaping the development of the law in a wide variety of areas; indeed, most leading constitutional law cases in this generation have Joe's fingerprints on them. His advocacy for the rights of sexual minorities is legendary. He served as counsel in *Egan*,¹ *Chamberlain*,² *Reference re Same-Sex Marriage*,³ and defended Little Sister's Book & Art Emporium,⁴ not once but twice, all the way to the Supreme Court of Canada. These are not cases that make lawyers rich but they contribute enormously to progress in Canadian society. His advocacy for justice in the workplace led to the Supreme Court of Canada overturning 20 years of precedent to provide *Charter* protection for collective bargaining in the *Health Services*⁵ case. The *Henry*⁶ case helped preserve the rule of law as meaningful for those most vulnerable to abuse by establishing that the *Charter* authorizes damages awards against the Crown for prosecutorial misconduct absent proof of malice. And it was in the *Insite*⁷ case that he argued against the Harper government's cruel resistance to safe injection sites in the Downtown Eastside of Vancouver, which led to an exemption under the *Controlled Drugs and Substances Act* and served as a springboard in more recent times for legislation designed not to thwart but rather to implement the court's judgment. He is also passionate about Indigenous justice, participating in leading cases like *Grassy Narrows First Nation*,⁸ *Delgamuukw*⁹ and *Tsilhqot'in*.¹⁰

But the case that Joe is most recently associated with and which has changed the lives of thousands of Canadians is the *Carter*¹¹ case, in which a unanimous Supreme Court reconsidered its decision in *Rodriguez*¹² and established access to medical assistance in dying. Lesser advocates would perhaps have been a little bit daunted by the existence of a Supreme Court judgment denying the remedy Joe sought and which was pronounced not that long ago. Joe was not. He persevered because he concluded that justice required it. He assembled a remarkable team of advocates and presented the court with affidavits from people around the world. Ultimately, he persuaded the court that it was time to provide a constitutional right to Canadians who meet certain specified criteria to avail themselves of the existence of physicians in choosing the time of their death.

Slightly more than a year after the judgment, the then new Liberal government introduced Bill C-14, which went some distance (but not far enough, according to Joe) to implement the *Carter* decision. The *Carter* judgment did not require a person to be near death; instead, it held that

those who are suffering from a grievous and irremediable condition, even one that is not terminal in nature, have the constitutional right to seek medical assistance in dying. However, Bill C-14 added a requirement of “reasonably foreseeable” death. Joe will soon be back before the courts arguing for Julia Lamb that the statute does not go far enough.

One of the challenges that Joe has met with great determination and creativity involves the fact many of the clients he likes to represent have no money to pay him. Constitutional litigation, done well, can be highly complex, requiring a great deal of time and resources to marshal the right evidence and to research and develop novel legal arguments. If the scope and content of constitutional rights were to be defined exclusively in litigation involving the corporate and institutional bodies that can afford to pay for it, the rights of the more vulnerable and marginalized members of society would likely never be recognized, and our understanding of fundamental rights and freedoms would be a thin and impoverished one. Joe has done perhaps more than anyone to ensure that the interests of vulnerable people are brought to the courts and that the interpretation of concepts like the right to “life, liberty and security of the person” takes into account the circumstances of those most desperately in need of the *Charter’s* protection. Not only has Joe taken on and won many complex cases for those who have no ability to pay, but also he has helped develop the law relating to costs so that sometimes lawyers acting in the public interest actually can get paid. Our constitutional law is much tricher, and Joe perhaps only a little bit poorer, as a result of his significant pro bono efforts.

As Professor Berger said last year in presenting Joe for an honorary doctorate in laws at York University’s Osgoode Hall Law School, “It is in no way hyperbolic to say that we live—and die—better in Canada by virtue of Joe’s advocacy. This is a remarkable thing to be able to say about the effect that one person has left on a country.” He went on to quote F.R. Scott, the poet, scholar and advocate who argued the famous case of *Roncarelli v. Duplessis*.¹³ In the introduction to his book *Essays on the Constitution*, Professor Scott wrote as follows:

Changing a constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and of cultural groups to one another and to the state. If human rights and harmonious relations between cultures are forms of the beautiful, then the state is a work of art that is never finished. The law thus takes its place, in its theory and practice, among man’s highest and most creative activities.¹⁴

Joe is nothing if not an exquisitely creative lawyer. As Professor Berger stated:

When one reflects on Joe Arvay's career as a lawyer and advocate it is equal parts inspiring and humbling to see that there is almost no part of our constitutional lives that has gone untouched by his extraordinary work. Through his advocacy, Joe Arvay has given meaning and content to our fundamental rights and freedoms, he has shaped our understanding of equality, he has worked to secure access to justice and he has steadfastly fought in service of the vulnerable and unpopular, insistently reminding us of the duties that we owe one another. Joe Arvay has lived the highest ideals of a life in the law.

But while Joe is most famous for his contributions to constitutional law, his litigation skills are broader than that, and he represents his institutional and corporate clients with the same fierce commitment and relentless energy. We were perhaps most impressed with Joe at the time of John Finlay's death. John was a formidable commercial litigator. Just before he died, Joe was called upon to take over a complex insurance litigation matter, an area of law in which at the time Joe had not worked nearly as much as he had worked in the public law sphere. Undaunted and unafraid, he jumped into a complex lawsuit in Ontario and did the client proud. To be able to move into an uncharted territory without fear is perhaps one of the reasons why Joe is so impressive as a litigator.

In a sense, there is nothing mysterious about Joe's success—he just works very, very hard. He thinks harder about his cases than any other lawyer we know, and just as much about the other side's case. He never stops looking for better evidence. He never stops thinking about how to improve an argument. His assistant Sally has many exceptional qualities that contribute to Joe's success—but maybe the most important is her patience with the relentless pace of his work. When Joe gets tired of working, he swims or rides his bike to relax ... and then he is likely to work some more.

In his search for good ideas, Joe is very democratic—some might say indiscriminate—about where the next best argument might come from. He listens carefully not just to his partners and associates, but also to the most junior student—or better yet, the person who sits next to him on the plane. If somebody, anybody, has a truly good idea, Joe will listen to it and take it as far as it will go. And if it is one of your ideas, it is very rewarding. That is one of the great things for anyone working with Joe—he can take what sounds like a wild idea and wrestle it into something that can change the law.

Of course, the results in the most challenging cases are sometimes mixed. Sometimes, with Joe's cases, it is hard to tell whether he has won or lost, at least for a few years. He has convinced the Court of Appeal that he won in front of them for the purposes of a costs application, then gone on

to convince the Supreme Court of Canada that they had to give him leave so that he could win again. And he did. That is exceptional.

Felix Frankfurter once said that one cannot be a truly competent lawyer without being a cultivated person. Joe is just that. He is one of the most well-read people imaginable with eclectic and far-reaching tastes. He has developed a burning desire to see the world, and so has travelled to South America, Africa, Europe and the Middle East. He has recently taken up the fiddle. Fishing at home or in the wilderness, riding his Harley through the desert, sailing solo to Alaska, writing a play in the Florida Keys, or off on a retreat to improve his fiddling skills, he is always “all in”, just like he is on his cases. At some point, he learned how to play the accordion. During more than one party, we have had to remind Joe what Oscar Wilde famously said, “A gentleman is someone who can play the accordion, but doesn't.”

Before Joe went to law school, he travelled around earning his keep by playing piano in bars. With his creativity, drive and determination, Joe might have had a brilliant career in the arts. But the legal profession in B.C., and the development of constitutional law in Canada, would have been much less enjoyable, and much less rich and interesting, if he had not been part of it. Perhaps the most remarkable thing about Joe, for those of us who have practised with him, is that he makes law so much fun. We would not have wanted to miss that.

Perhaps the most relevant quote to describe Joe Arvay is something written in 1855 by George Sharswood, American jurist and scholar: “[N]o man can ever be a truly great lawyer, who is not, in every sense of the word, a good man”.¹⁵ Joe Arvay is a good man. His contributions to his community and to his country are hard to exaggerate. A loving father to his children, a delightful grandfather, and a devoted husband to his wife Connie, Joe is a truly wonderful friend and a great human being. We feel proud to know Joe.

ENDNOTES

1. *Egan v Canada*, [1995] 2 SCR 513.
2. *Chamberlain v Surrey School District No 36*, 2002 SCC 86.
3. 2004 SCC 79.
4. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 and *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.
5. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.
6. *Henry v British Columbia (Attorney General)*, 2015 SCC 24.
7. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.
8. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48.
9. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
10. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.
11. *Carter v Canada (Attorney General)*, 2015 SCC 5.
12. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.
13. [1959] SCR 121.
14. Frank R Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto and Buffalo: University of Toronto Press, 1977) at ix.
15. *An Essay on Professional Ethics* (Philadelphia: T & W Johnson, 1855) at 94.

