

ON THE FRONT COVER



barbara findlay, Q.C.

By the Honourable Donna Martinson, Q.C.

I first met my friend, barbara findlay, Q.C.,¹ a self-described queer, activist feminist lawyer, in the early 1990s. I was a member of the B.C. Provincial Court's Equality Committee and barbara was invited by the court to present a workshop called "Unlearning Homophobia" to the committee members. When we initially met I felt that we had so much in common. We are both white women, born in the Canadian prairies in 1949, within a month of each other, lived in working class families where no one had been to university, and started university in 1967. We both attended law school with the idea of obtaining a set of tools which would help us make social change. We both became feminists with significant concerns about women's inequality in society, an inequality reflected in the law, believing in the concept of justice for women under a broader notion of justice for everyone. We both practised law and taught law as full-time faculty members at UBC's law school, and worked on legal education programming for lawyers and for judges.

I soon learned, however, that this is where the similarities in our experiences significantly diverged. When we both started university, engaging in heterosexual sex was not a crime; gay sex was. barbara, as a first year student, consulted the student health service psychiatrist. She told him that either something was wrong with the world, or something was wrong with her, and she hoped it was the latter as it would be much easier to fix.

At the time, barbara had no idea that she was a lesbian. It was not a subject that came up directly in her therapy: it was unspeakable. But the psychiatrists clearly thought there was something wrong with her, institutionalizing her against her will, telling her they would turn her into

a “normal girl”. At the time, “homosexuality” was listed as a mental disorder under the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association.

As a woman and feminist, I and other women law students encountered several gender-related challenges at my law school in Alberta—law school events being advertised by nude posters of women among them. However, I did not have the additional experience of having to be completely silent about my real identity. barbara has described how, at law school, as a lesbian, she lived “in a glass closet”; her identity was there to be known, but most people did not know to look. It never occurred to straight people that there were lesbians and gay men among them. That invisibility created the only safety there was. On one occasion she and a man who was also at the law school went to Wreck Beach together and came out to each other. It was a moment she describes as “etched in my memory by the blazing bright sun of the day and by the acid of my fear, and his.”

Our experiences in being called to the bar in the 1970s were also very different. For me, I simply had to show the standard credentials, a law degree and the requisite articling, and the rest was routine. barbara was required to provide a letter from a psychiatrist, attesting to her mental health and suitability to practise law.

I will fast forward to the 1990s and my introduction to barbara and her work. Around that time I had the honour of co-chairing, with an Ontario judge, a major national judicial education initiative of the Canadian Judicial Council for the National Judicial Institute. Its purpose was to develop “in-depth, comprehensive and credible social context education” for Canadian judges. Doing so recognized that in order to obtain equality-based justice, legal analysis and decision making must take into account not just “the law”, but also the social context—the lived reality—of the people the justice system serves. It is from this vantage point, which continued while I was a B.C. Supreme Court judge and since, that I have had a chance to observe barbara and the ways she practises law, and to work with her on legal education initiatives.

The legal profession has much to learn from barbara about what it really means to make access to justice a central aspect of professionalism and to focus on access that will result in just outcomes. Her work demonstrates what our *Code of Professional Conduct* requires of lawyers in applying the principle that “admission to and continuance in the practice of law implies a basic commitment to the concept of equal justice for all ...” What follows is a glimpse at the significance of the reality of the lives of the people barbara serves, at factors that have influenced how she does her work, and at

what she has actually done through her advocacy to achieve just outcomes. I use the word "queer" throughout, being a term barbara prefers.

barbara says it is difficult to explain the profound invisibility involved in not being able to be who you really are—"the unstated life, the invisible life, the secret life"—and what it does to your soul. "People cannot live in invisibility."

For the first years of her practice barbara lived two lives: as a lesbian feminist community activist, and as a lawyer. She said there was no risk of crossover, because lesbians didn't like lawyers and lawyers didn't know about lesbians. Eventually barbara recognized that she had to put the parts of her life together. From then until now her strategy has been to keep nothing about her life "private". She removed the threat of being outed by outing herself, everywhere.

When barbara began practising law, homosexuality had very recently been decriminalized. Not only were there no laws affording rights to queer people and their partners, fully 25 per cent of the laws of British Columbia, as well as a multitude of federal laws, specifically discriminated against queers by extending rights to "[heterosexual] spouses". Laws discriminated in relation to everything from family law and marriage, to the availability of government benefits, to the right to sit on the board of professional corporations. barbara had been practising law for 15 years before the B.C. *Human Rights Code* included protection. The federal *Human Rights Act* did not add that protection until 1996. She had been practising law for 8 years before the *Charter* came into effect, and for 18 years before the Supreme Court of Canada determined that the equality rights section of the *Charter* protected lesbians, gay men and bisexual people from discrimination.

Early in her career, lesbians and gay men did not expect either justice or access to it; they were "just trying to stay out of the way of the arm of the state." They could, for example, be fired from their jobs or evicted from their homes with no recourse. Family relationships when there were children were simply not recognized. Lesbians who came out routinely risked losing the children born to them while they were married. When a lesbian couple had children, barbara was never once successful in applying for any contact by the non-biological parent when the relationship broke up, notwithstanding that the *Family Relations Act* allowed a "person" to apply.

An experience that barbara had at law school influenced her approach to the practice of law. She got to law school via a masters degree in sociology and an intensive exposure to feminism. On the first day of law school, the professor told her class that he felt sorry for the girls in the class, who had to be either fluffy and incompetent, or cigar-smoking ball-breaking bitches,

a discouraging observation about the attitudes to women already in, and coming into, the legal profession.

Another experience had a significant effect on barbara's approach to equality and justice. In the 1980s she attended an "Unlearning Racism" group and recognized that people can be privileged and oppressed at the same time. She, as white and a lawyer, was part of a privileged group. She concluded that unless people work as hard on the areas in which they are privileged as those in which they are oppressed, there will never be equality or justice.

That perspective informed the work she did at Legal Services Society where she worked closely with Theresa Tait, the Director of Native Programs, to support native people to develop policies and programs about their relationship with the dominant legal system. It has also informed the legal work she has done with First Nations women and the work she continues to do with transgender communities. The "Unlearning Oppression" workshops which barbara has done in hundreds of venues grew out of her "Unlearning Racism" experience.

For barbara, access to justice for her clients and her community means that the law must have justice on offer, a justice that is nimble, elastic, changeable, and transformed by new thoughts and values, rather than one that catches up with them years later. It also means that people must know the law and that "lawyers and judges involved in cases affecting queer people must be able to 'see' us without reflexively triggering the stereotypes of queer people as mad, bad or sad." She has worked tirelessly to achieve these objectives.

For her queer clients the law did not have justice on offer. The law did not even "see" her clients. One of the things barbara learned was that to act for people in marginalized communities involves listening to the silence, and translating the lives of people into the terms of the law.

This meant changing the laws and that in turn required political action. She was part of the December 9th Coalition, a community action group which had as its stated goal "Working together across our differences for our welcome in the world". barbara describes the expectation that queers would be welcomed, as opposed to tolerated, as revolutionary. The December 9th Coalition advocated politically for everything from inclusion of sexual orientation as a census question to holding community consultations about how they wanted to be treated under "family law" to meeting with the Attorney General to argue for the abolition of the "homosexual panic defence". It meant advocating, successfully, to become the first jurisdiction in the world to permit same sex couples to adopt children together.

Access to justice meant finding ways for lesbians and gay men to realise that they were gaining some rights. That meant issuing press releases every time there was a move forward, or a move backward, in the law so that the press would cover the story. The press had barbara on speed dial, for background information about how the law impacted queers or for quotes about any developments. It also meant that she, using her outstanding skills as a teacher, regularly held seminars for, and spoke to, anyone who was interested about what the law provided for and did not provide for, and how the gaps might be addressed.

Access to justice also meant asking communities of queer people what they wanted from the law. Same sex partners and families had never been recognized in family law. Did queer communities want that recognition? The December 9th Coalition held consultations called "Talk Family to Me" to develop an understanding of where the community wanted to be in relation to the law.

After a decade at the Legal Services Society, and a few years on the Faculty of Law at UBC, barbara went into private practice. She decided that the law would never change until the profession and the judiciary could "see" lesbians and gay men. She decided to "make noise where there had been silence; to make it impossible for the courts, the law, the legal profession not to know there were queer lawyers and queer clients." barbara's experience then was that no one talked about this in any context; no one would use the word "lesbian" when speaking to her, even when she was on equality committees for lawyers. The fact that "we queers felt our safety was in the closet, created a perfect storm for homophobia."

barbara says that as she became known as a "lesbian lawyer", she had to advise women family law clients that if they hired her, their "ex" would assume that they were a lesbian, and that if that was a problem they should hire someone else. Several did; they could not afford to be outed by association.

What were barbara's contributions to the education of lawyers and judges? She joined every equality and diversity committee there was at the Law Society, and at the CBA both provincially and federally. She wrote briefs and insisted that lesbians and gay men, and later, transgender people, be included in every position paper about equality in the profession. She co-founded both the B.C. branch and the national Sexual Orientation and Gender Identity ("SOGI") Conference of the CBA. She did equality rights workshops for the benchers, for the judiciary, for anyone who asked.

One of the projects of the SOGI Conference was a meeting between leaders of the legal profession and about 70 lesbian and gay lawyers. It was a

strictly anonymous meeting, held on the basis that the lawyers' identity would not be further revealed. Each lawyer spoke for one minute about the challenges they faced in the profession. barbara's impression was that the leaders who were there were very surprised at both the number of lawyers who came and the extent of the hardships they described. She also thought they were deeply moved by what they heard.

As a result of the work that barbara and a handful of other queer lawyers across the country did, by 2005 there were no laws, federally or in B.C., which discriminated against queers or their families, an amazing accomplishment to be sure, but not one which necessarily translates directly into just outcomes for particular people or groups of people. As barbara puts it, "in the blink of a judicial eye, gay, lesbian and bisexual people went from being criminals, from being by definition mentally ill, from being preached against as evil, from being invisible in and to the law, to being 'usualized' in the law. So ... problems solved? Not so much."

In her work, as it continues, she recognizes that laws need to be translated into actual outcomes for real people. She thinks that, just as courts in equality cases are enjoined to consider the facts from the claimant's perspective, lawyers who act for marginalized people must learn how to listen to their clients and consider their legal situation from the client's perspective. This requires lawyers who have up-to-date knowledge about social context and can analyze contextually, with dedication and creativity, armed with an in-depth knowledge of equality principles so that they can identify and remedy inequality effectively. Examples from barbara's practice include filing and winning a world-first human rights complaint to enable lesbian co-moms to be registered together as a child's parents when the child was born; arguing successfully for the human rights protection of trans people under the ground of "sex"; and writing donor insemination agreements for fearful moms who conceived with sperm from a known donor and worried that the donor might later assert a status as a parent.

barbara points out that the equality journey for trans people is still in its early stages. "Just as society, and the law, didn't recognize gay and lesbian people and the systemic discrimination they faced for a very long time, the law now routinely and blindly discriminates against transgender people. The existence of trans people, especially non-binary trans people, challenges every aspect of our intensely-gendered society." barbara is currently working on cases to take gender markers off birth certificates, social insurance numbers, and passports.

Many lawyers will know barbara from her work on the issue of accreditation of graduates of Trinity Western University. At the special general meet-

ing of the profession, she moved the motion to reverse the Law Society's decision to accredit graduates. She got a standing ovation. barbara says that moment was one she never dreamed would come: the profession stood up en masse for the equality rights of queer people. It was a balm to her soul.

barbara has received many honours and much recognition for her work, more than can be mentioned here; I will refer to two. For her, the greatest honour of her life has been to be adopted in 2001 by the Wet'suwet'en people and given the name Ba Zil ha Lay, "Many Spirits". That happened at a potlatch, through Theresa Tait, a hereditary chief "Wi'hal'ait" of the Wet'suwet'en nation, and barbara's collaborator on many initiatives affecting First Nations people. Theresa and barbara made a promise to each other: barbara would address racism in her communities; Theresa would address homophobia in her community.

In 2015 barbara was featured in an hour-long television documentary called "In Particular" about queer legal history in Canada viewed through the lens of her life. It is a powerful piece, well worth seeing, and necessary because, as she puts it, this history has been written on water. Many people whose lives have been touched by barbara and her work, were interviewed; I will refer to four.

First, Craig Maynard, a member of the December 9th Coalition, describes how "barbara taught us to put our fears aside and be a little bit braver and stand up a little bit taller". Second, Jeannette Piry, a recent client, describes how she came to see barbara because her lesbian partner of 51 years was ill and in a care facility; her client felt that they had to go back in the closet there—she couldn't even hold her partner's hand to comfort her, because of other residents, whom she calls "straight, old, decrepit couples". A third is Deborah Brady, a trans woman around the same age as barbara and me, who compellingly makes the point that "people question whether we are human or not—it's like we are from Mars."

The fourth is an interview with barbara's client Tru Wilson, a 12-year old transgender girl. barbara's work with Tru and other trans kids allows me to conclude by highlighting her very important work on justice for children. barbara has an in-depth understanding of the importance of the significant legal rights children and youth have to participate in decisions of all kinds that affect them directly, and to have a voice in the creation of laws and policies that have an impact on them. In Canada, we lag behind numerous other countries in implementing those rights; many of us prefer to view decisions made by adults as always being in children's best interests.

Not barbara. When she says that being invisible can damage one's soul, she understands that being invisible, both personally and to the law, is

much more difficult for children; as Tru's parents say in the documentary, one third of trans kids attempt suicide. barbara has really listened to these children, gained an understanding of the realities of their lives, and empowered them by giving them an active role in pursuing results that will have such a major impact on their lives. Tru Wilson, for example, spoke at her B.C. Human Rights Tribunal hearing alleging discrimination by her school, and was recently given the number 12 spot on *Vancouver Magazine's* Power 50 list for her efforts.

I had the real privilege of meeting Harriette Cunningham, another 12-year old trans girl who has barbara for her lawyer. I worked with barbara and others in planning a two day CLEBC conference in May 2015 called "Access to Justice for Children". Harriette and barbara co-presented. Harriette spoke about the realities of her life as a transgender child facing the gendering practices of her public school, to a standing ovation. When my husband watched the video of her remarks, he described Harriette as a young barbara findlay. Harriette was recently named a trailblazer by *Chate-laine* magazine.

I am so pleased that the *advocate* is recognizing barbara "on the cover". I agree with B.C. Supreme Court Justice Mark McEwan's description of barbara and her work. He calls her a strong and dedicated advocate for the marginalized and the dispossessed, with a profound sense of the vocational responsibility of lawyers to try to improve society, adding that he has great admiration for her unstinting efforts to make things better.

Writer Sheila Gilhooly, barbara's partner of 25 years, says that she first saw and heard barbara at a meeting. She asked who she was. Her friend said, "that's barbara findlay—she makes the world shake around Vancouver." She does indeed, and we are all better off for it.

ENDNOTE

1. barbara findlay spells her name without capital letters. This situation has given rise to many theories about why she does this. It has caused a court registry to reject an order (due to a misspelling) and autocorrect features on word processing programs are unrelenting in their attempt to correct the spelling. barbara has noted that for a long time even

the local queer newspaper refused to spell her name without capital letters. For barbara, this issue is a "perfect illustration of how we react when someone moves even a tiny bit away from a norm of behaviour, even with respect to something that has no impact on anyone else."