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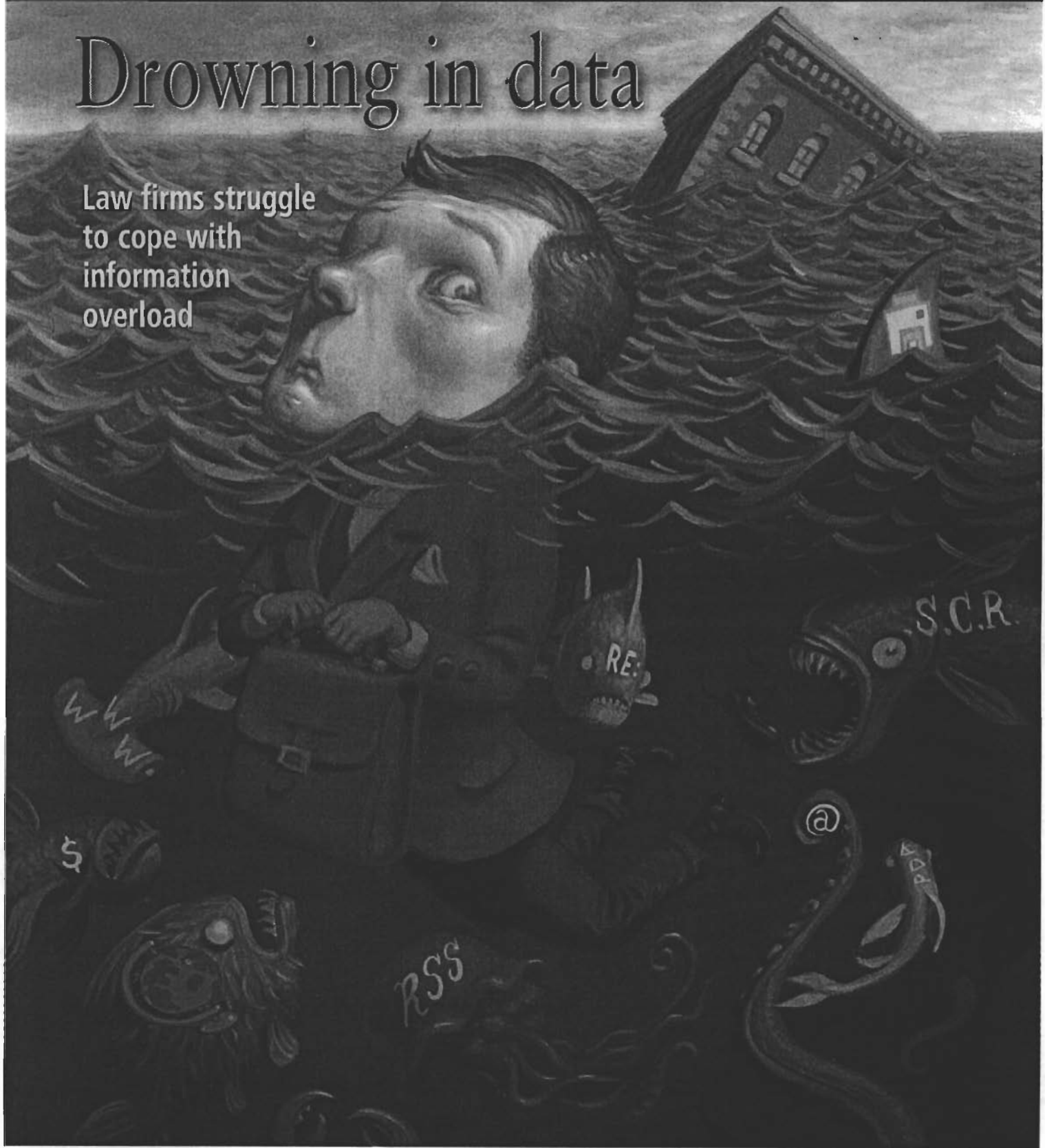
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Drowning in data

Law firms struggle to cope with information overload





Ruth Johnson
Lawson Lundell, Calgary

"First Nations' shareholders are their community, so they have a different philosophy than mainstream businesspeople. To use a non-lawyerly term, they are more holistic."



First Lands

Real estate development on some First Nations reserves is starting to take off, thanks to self-governance regimes that give bands the power to lease their lands to developers. Real estate lawyers are an integral part of the trend.

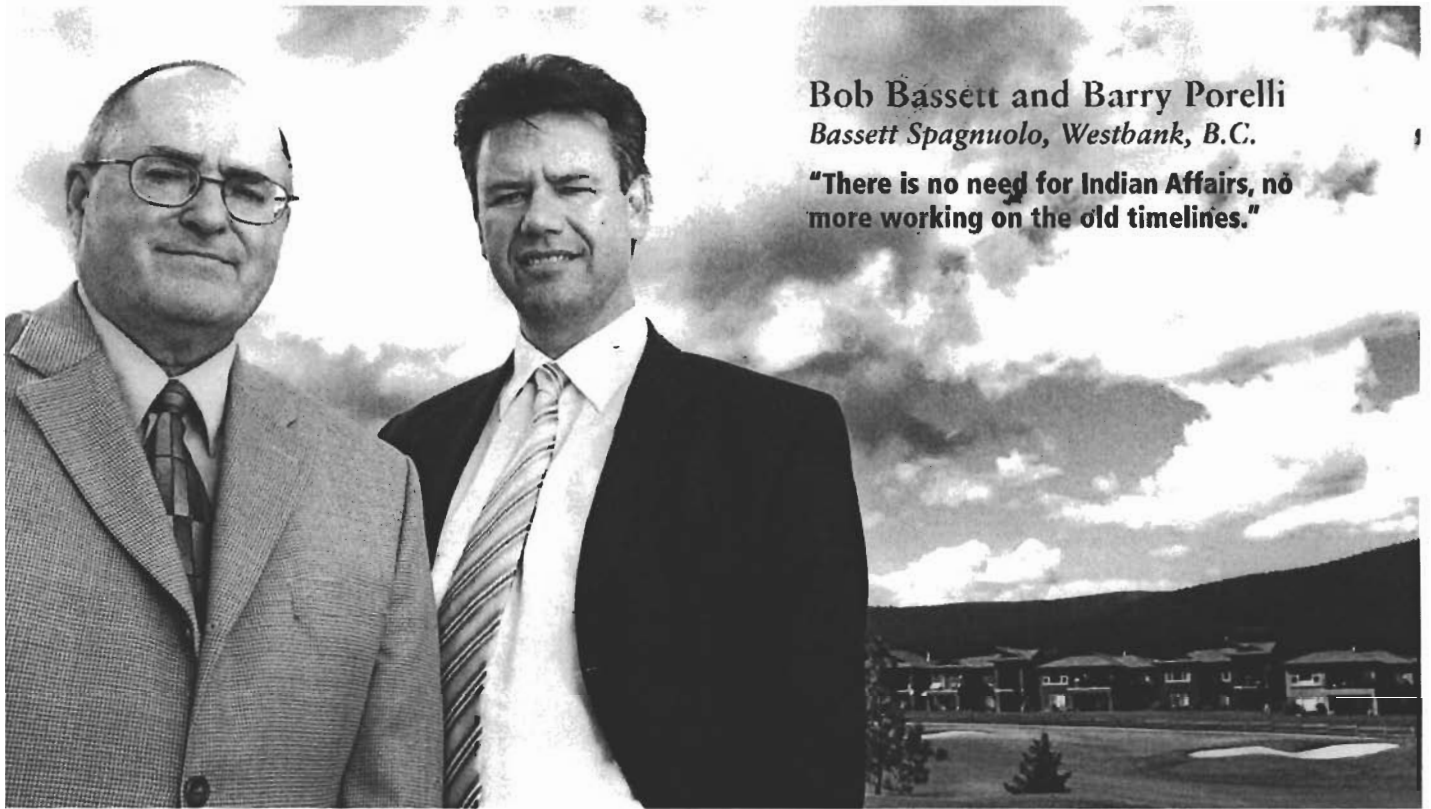
BY AVA CHISLING

Ruth Johnson remembers when she first felt the change, eight years ago at a conference in Fort McMurray, Alberta. The environmental, aboriginal and commercial law lawyer with Lawson Lundell in Calgary recalls a First Nations man speaking at the conference on economic and resource development.

"He said, 'Look, it is time we put past grievances behind us. It is time we took control of our own people and our own industries,'" she says. "I remember thinking that was the most positive thing I had heard in a long time." The statement foreshadowed the coming revolution in how First Nations peoples control and leverage their own lands, a revolution that has also sparked a growing niche for real estate lawyers.

In increasing numbers, First Nations bands are leasing portions of their own land to real estate developers, who in turn are building residential

JAZHART STUDIOS/MARIE BURKHART



Bob Bassett and Barry Porelli
Bassett Spagnuolo, Westbank, B.C.

"There is no need for Indian Affairs, no more working on the old timelines."

units, condominiums, hotels, shopping centers, golf courses and other structures. The bands collect lease and property tax revenue, while the developers benefit from the often outstanding locations on offer. Lawyers familiar with both real property and aboriginal law are helping make it happen.

Taking control

First Nations' struggle for control over their land is well-known, but in the absence of self-government status, most cannot lease their own land without Ottawa's approval. "The *Indian Act* is very paternalistic," says Bob Bassett of Bassett Spagnuolo in Westbank, B.C., who has built a specialty in First Nations real estate transactions. "The presumption is that Indians cannot look after their own affairs, so we will."

But over time, forward-thinking bands like Westbank, Tsuu T'ina and Squamish have set up leaseholds, while some bands, having obtained self-governance, conduct their own negotiations directly. Today, these bands are experiencing, in Bassett's words, "an explosion of growth."

First Nations bands can lease their lands in several ways, the most common of which is the "headlease." The band enters into a 99-year agreement with a developer, which develops and subdivides the land and subleases it to interested purchasers. These sublessees use the property, pay rent, common costs and taxes, and are free to sell, mortgage or otherwise alienate the property.

There is often an approval process that sublessees must follow in order to carry out these alienations. But Bassett says that "since 1992, I have done about 1,500 of these transactions and probably around 300 assignments. I have never seen a refusal."

After the 99-year headlease expires, the lessees and sublessees give the property back to the band. "Our potential clients call and ask us, 'What do I get? What happens after 99 years?'" says Bassett's partner, Barry Porelli. "We provide them with answers and in our experience, most of them decide it is to their advantage."

Another approach is to use the federal *First Nations Land Management Act*. This statute creates a regime whereby bands can develop their own land codes and land regime, says Brian Barrington-Foote, a former deputy minister of justice for Saskatchewan who now practises with MacPherson Leslie & Tyerman in Regina.

Reserve land is not park land, and First Nations can use it for commercial purposes if they wish. "Many First Nations can only develop their economies if they leverage it,

JOHN McDOUGALL

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whether as a capital asset or for a lease revenue," says Barrington-Foote. The most common development on First Nations land is a mixture of residential and commercial, from massive Wal-Marts to lakeside resorts and hotels.

These developments have taken a unique course in B.C., largely because of the relative paucity of treaties there. "Our issues are dealt with via litigation, which has brought the First Nations along in a more dramatic way," says Jim Reynolds of Ratcliff & Company in North Vancouver, who has developed a niche practice in this area. "And they have some of the prime land."

Self-governance strengths

While 90% of First Nations bands must go through the Department of Indian Affairs to lease their land, some have either limited control of their land or outright self-government, which gives the bands much more freedom. The prime example of that is the Westbank band in British Columbia, which has control over its reserve land via the 2004 *Westbank First Nation Self-Government Act*.

"Thirty years ago, they showed me a plan for development," says Bassett, who has handled numerous real property transactions for Westbank. "This band appreciated doing business." The 175-unit condos of the band's Aria Apartments development sold out in one day. Property that was worth \$99,000 in the early 1990s is now worth more than \$300,000.

Today, Westbank has only 500 band members, but 10,000 people now live on its reserve lands, along with 100 businesses — "everything from mom-and-pop bakeries to the giant box stores," says Bassett.

Barrington-Foote also points out the example of the Tsuu T'ina in Alberta. "They have a business park that has been designated for leasing that is excellent land in an excellent location. It cannot be matched in the rest of Calgary," he says. "In fact, developers can't get large blocks of industrial and commercial land in many parts of Calgary."

Businesses that set up shop on the Tsuu T'ina reserve get unique locations and have access to the land at fair values. The Tsuu T'ina band members, whose reserve "is right next to Calgary — or as they put it, Calgary is right next to them — get opportunities to work at home," says Barrington-Foote.

Barrington-Foote has had a long relationship with the Tsuu T'ina band. "It is self-governing only in the usual sense. They are a band within the meaning of the *Indian Act*, and it is their position that they have an inherent right that extends beyond what is granted by the Act. The reality of reserve life in most First Nations communities is that the chief and council are usually extremely important to most facets of life on reserve."

Rapid transitions

One of the main benefits flowing to bands from self-governance status, in addition to the ability to conduct transactions on their lands, is the increased speed by which these transactions can be consummated — an important asset in a booming economy.

"Even when Westbank had limited control of their land, it took 16 months to two years to get a single lease done," says Bassett. "Now it can be done in months. There is no need for Indian Affairs, no more working on the old timelines." Barrington-Foote agrees: "I have done sublease transactions that can take literally a couple of weeks if you don't need federal involvement. If the designation is already in place, it can go quickly."



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Territoires convoités

Les Premières nations sont à l'avant-plan du développement immobilier.

Ruth Johnson se souvient du moment où elle a compris que les choses avaient changé. C'était il y a huit ans lors d'une conférence qui se tenait à Fort McMurray en Alberta.

L'avocate, qui œuvre au sein du cabinet Lawson Lundell à Calgary et se spécialise en droit commercial et en droit autochtone, relate les propos d'un représentant des Premières Nations qui avait alors pris la parole. « Il a dit : le passé, c'est le passé. Nous devons nous prendre en main et reprendre le contrôle de nos industries », raconte-t-elle.

Cette phrase annonçait le début d'une petite révolution quant à la façon dont les Premières Nations allaient gérer leurs propriétés terriennes. Désormais, les bandes autochtones louent des portions de leurs terres à des promoteurs immobiliers qui les transforment en parcs immobiliers, en centres d'achats, en terrains de golf ou en complexes hôtelier. La bande fait des profits en plus de percevoir des taxes, alors que les promoteurs bénéficient d'emplacements extraordinaires.

DES BAUX À LONG TERME

Bien que la lutte des Premières Nations pour l'auto-détermination soit bien connue, peu de groupes autochtones ont atteint ce statut. Ils ne peuvent donc pas louer leurs terres sans l'approbation d'Ottawa. « La Loi sur les Indiens est très

paternaliste », déclare Bob Bassett du cabinet Bassett Spagnuolo de Westbank en Colombie-Britannique.

Cela n'a toutefois pas empêché certaines bandes d'aller de l'avant. Bien qu'elles puissent louer leurs terres de différentes façons, la plupart optent pour des baux d'une durée de quatre-vingt-dix-neuf ans. Il revient alors au promoteur de développer l'espace loué en le subdivisant et en sous-louant les diverses unités.

D'autres bandes se prévalent plutôt des dispositions de la *Loi sur la gestion des terres de Premières Nations*. Cette dernière permet aux bandes d'adopter leur propre régime de gestion des terres, explique Brian Barrington-Foote, du cabinet MacPherson Leslie & Tyerman de Regina.

Les terres qui se trouvent sur une réserve n'ont pas le même statut qu'un parc national et il revient au Conseil de bande d'en déterminer l'usage. « Ils [les autochtones] tiennent non seulement à leurs terres, mais ils savent qu'il s'agit d'une excellente façon de donner un bon coup de pouce à leur économie », avance Me Barrington-Foote. La plupart des développements immobiliers sont un mélange d'usages commerciaux et résidentiels, allant de la construction d'un Wal-Mart à la création de lieux de villégiature en bordure de lacs.

DES PARTENAIRES MIEUX INFORMÉS

Toutes les initiatives n'ont pas été nécessairement fructueuses. « Les premiers

développements immobiliers n'étaient pas avantageux pour les Premières Nations puisque ces derniers ne bénéficiaient pas des conseils appropriés, estime Jim Reynolds du cabinet Ratcliff & Company de North Vancouver. « Ils croyaient que les fonctionnaires veilleraient à leurs intérêts, ajoute-t-il. Ils s'assurent désormais d'obtenir les meilleurs conseils juridiques, financiers ou au sujet de l'immobilier. »

Certains partenaires hésitent toujours à faire affaire avec les bandes autochtones. « C'est parfois dû à un manque de connaissances ou de moyens. Il arrive parfois que certains ont aussi vécu une mauvaise expérience », commente Me Barrington-Foote. Mais la plupart du temps, les institutions sont très heureuses d'établir des partenariats avec les membres des Premières Nations. Et les occasions ne manquent pas.

Les avocats qui sont impliqués dans ce domaine du droit en pleine croissance trouvent leur travail très satisfaisant. « Ce genre de transaction est très intéressant », déclare Me Johnson. « Vous devez faire en sorte que les Premières Nations retirent tous les avantages de la *Loi sur les Indiens* sans que leurs partenaires non autochtones ne soient incommodés par cette dernière. Chaque transaction est différente. » ■

— Mélanie Raymond

“For a complex, politically difficult project that breaks significant new ground legally for the government, the First Nations or the partners,” he adds, “there can be longer timeline like 18 months to get through the commercial and governmental side of the negotiations. However, other transactions can be relatively straightforward and simple.”

Ultimately, it depends on the nature of the transaction, the sophistication of the professional advisors on both sides, and the relationship between people and agencies, says Barrington-Foote. Today, the government is more flexible. “For example, it used to be that a five-year rent review was the only kind of lease [the government of] Canada would look at,” he says.

“Now it's different. Big-box companies don't rent on this

basis, so changes happened. Now Canada will look at other arrangements and in some cases, will even allow First Nations to use their land as equity in transactions.”

What the future holds

When looking to the future of land-use development on reserves, there is no reason to believe that past is prologue. “The early developments did not turn out to be favourable to the First Nations, because they didn't have sophisticated advice,” says Reynolds. “They relied upon the bureaucrats to look out for them. Now they make sure they get better advice, whether legal, financial or real estate.”

Even today, some potential partners are still hesitant to conduct business with First Nations' bands. “Sometimes it's a

Brian Barrington-Foote
McPherson Leslie & Tyerman, Regina

"Many First Nations can only develop their economies if they leverage it, whether as a capital asset or for a lease revenue."



lack of knowledge or a lack of capacity; sometimes it was one negative experience," says Barrington-Foote. But for the most part, institutions both large and small are happy to deal with First Nations' bands. And there is no shortage of opportunities.

Barrington-Foote believes the bands will move very carefully in the development of their land. "First Nations have the ability to zone, and community planning is a common part of the work. Tsuu T'ina reflects this," he says. "I don't think development is going to turn Tsuu T'ina into a strip mall."

"First Nations' shareholders are their community, so they have a different philosophy than mainstream businesspeople," Johnson says. "To use a non-lawyerly term, they are more holistic." Barrington-Foote agrees. "If you or I owned the spectacular land base that the Squamish own, what are the chances we would have protected it in the fashion that they did for so long? Their relationship to land is not just about money."

"Alberta is a prosperous province based on land resources, so players are willing to share because they have to," says Johnson. "Both parties work very hard to bridge the [cultural] divide. As they negotiate, not only for leased land, but for oil development, drilling partnerships, farming out their own rigs and others, there is a lot of positive communication that goes on. Everyone wants the same bottom line, so they learn from each other."

The lawyers involved in this growing area find the work fascinating and satisfying. "Working on these deals is very interesting," Johnson says. "You have to structure it so the First Nations can take advantage of the *Indian Act*, while at the same time, their non-native partner must be protected from the *Indian Act*. Every deal is different."

"Stepping back 30 years, most of my practice was looking at the *Indian Act* and deciding what could be done [with] on-reserve development," says Reynolds. "Now, more of the First

"If you or I owned the spectacular land base that the Squamish own, what are the chances we would have protected it in the fashion that they did for so long?"

Nations are involved in off-reserve development.

"Because of the Haida judgment, any large-scale decision, whether it is the expansion of the port or the Sea-to-Sky highway or the 2010 Olympics ... none of those things can really take place without involving the First Nations. For sure, the future will be better than the past." ■

Ava Chisling, formerly the executive editor of *enRoute* magazine, is currently completing her articles in Montreal. Her previous article for *National*, on courtroom technology, appeared in our March 2007 edition.

PAUL AUSTRING