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LAW MATTERS

Political Governance

The SNC-Lavalin Affair: Why Government Are Not Angels

Let's Not Turn the SNC-Lavalin Affair into a Bar Exam Hypothetical

Looking Under the Hood of the Constitutional Mechanics of Aboriginal Law

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITOR'S **NOTE**

BY **JOSHUA SEALY-HARRINGTON**

As Amy Kishek aptly tweeted[1]: is "[a]nyone else struggling with work/life/political scandal balance?"

Recent months have been dominated by discussion of the SNC-Lavalin scandal, and its fall out. As background, SNC-Lavalin was charged with corruption and fraud. The Liberals won the federal election, shortly after which Prime Minister Justin Trudeau named Jody Wilson-Raybould as the first Indigenous Attorney General of Canada. The Liberals proposed *Criminal Code* revisions permitting remediation agreements, which SNC-Lavalin lobbied for. The public prosecution service declined to negotiate a remediation agreement with SNC-Lavalin. Contested discussions amongst various actors ensued regarding the merits of negotiating such an agreement, which Wilson-Raybould could influence as Attorney General. Trudeau shuffled his cabinet, including moving Wilson-Raybould to Veterans Affairs (widely seen as a demotion). And then, the tipping point: the *Globe and Mail* reported that the Prime Minister's Office interfered with Wilson-Raybould regarding the prosecution of SNC-Lavalin; Trudeau cited Wilson-Raybould's continued presence in cabinet as demonstrating the absence of any such interference; the next day, Wilson-Raybould resigned from cabinet; Trudeau retorted that, if Wilson-Raybould felt undue pressure, she had a duty to report it; Gerald Butts — Trudeau's principal secretary — resigned from the Prime Minister's Office days later; the Liberal Party voted down an opposition motion calling for a public inquiry; various leaks, suspected to originate with the Prime Minister's Office, sought to discredit Wilson-Raybould; Wilson-Raybould released a secret recording of her conversation with the country's top bureaucrat to corroborate her perspective; Wilson-Raybould and Dr. Jane Philpott — who was critical of Trudeau — were both ejected from the Liberal caucus; Andrew Scheer — the leader of the opposition Conservative Party — called the scandal "corruption on top of corruption on top of corruption"; and, most recently, Trudeau provided Scheer with a letter notifying him of a potential libel claim, raising concerns about silencing political discourse. *Gasps for air*

It's been a wild ride, and it's far from over.

The polarization has been palpable; everything seems contested. The appropriate considerations for a remediation agreement; the relevance of identity (e.g., Trudeau being a white man and Wilson-Raybould being an Indigenous woman); the ethics and legality of Wilson-Raybould's private recording — both sides are advanced repeatedly, and passionately, in the battlegrounds of duelling op-eds and *Twitter* threads. This edition of *Law Matters* joins the fray.

We are delighted with the contributions in this edition on Canadian political governance. Leonid Sirota and Mark Mancini detail how the SNC-Lavalin scandal shows both the strengths, and weaknesses, of the Canadian model of responsible government. David Slavick interrogates how, while the SNC-Lavalin scandal is legally interesting, it is not legally scandalous, but rather, an unavoidable by-product of the grey areas inherent in law and politics. Christina Gray interviews Joshua Nichols to discuss fundamental questions about Canada's assumed constitutional architecture and its relationship with Indigenous sovereignty — a fascinating exercise of, in my view, Critical Aboriginal Theory, which questions the foundational legitimacy of Canada's current legal relationship with Indigenous people.

Further, I sat down with Mike Morrison and Emma Stevens — the founder and manager of *Mike's Bloggity Blog* — to discuss the interplay of journalism, social media, and government accountability. Lastly, Nancy Carruthers explores the ethical questions raised by judicial return to practice, yet another dilemma implicated in the SNC-Lavalin scandal by virtue of Wilson-Raybould retaining former Supreme Court Justice Thomas Cromwell to advise her on the scope of privilege.

This scandal is not dying down. Indeed, many view Trudeau's handling as playing an aggravating role in the scandal's seeming immortality. No matter your instinct, however, it is indisputable that the SNC-Lavalin scandal raises complex questions about governance, ethics, and identity. We hope that these contributions trigger further reflection on these many fascinating issues.

[1] twitter.com/amykishek/status/1102734860735733760

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PRESIDENT'S **REPORT**

BY **FRANK FRIESACHER**

"Spring is the time of plans and projects," wrote Leo Tolstoy: so apt for our organization! Once you read this, most Law Day events across the province will have been held, exposing Albertans to the justice system with popular mock trials, courthouse tours and Dial-A-Lawyer events. This year there were some special organizational challenges: Edmonton courthouse renovations, increased security, and government electoral restrictions. Law Day is only possible with the incredible volunteers who come together to plan many activities, and we thank you for making this an outstanding public legal education event. We also appreciate our partnership with Immigration, Refugees and Citizenship Canada (IRCC) in hosting citizenship ceremonies in conjunction with Law Day.

CBA Alberta took advantage of the 2019 Alberta election with "Justice Matters: An Agenda for Justice," raising several issues affecting our province:

- **Access to Justice** demands not only that we consistently and adequately support legal aid, but that we do not deny a fair hearing to vulnerable Albertans who cannot afford a lawyer but make too much to qualify for legal representation programs. We ask government to build on the 2018 commitment to advance legal aid, and to enhance the role of the pro bono sector.

- **Resources for the Justice System:** The importance of a timely and effective legal system cannot be overemphasized. A well-developed and properly resourced justice system is critical to a healthy democracy. An inadequately resourced system results in significant delays and accessibility challenges.

- **Family Justice:** Most Albertans will be affected by family law issues, be it divorce, child or partner support, parenting or guardianship, and child protection. We ask the next government to commit to long-term support of multi-disciplinary approaches between courts, government, the legal community, social/health organizations, educators and researchers, all with a vision of reforming family justice in Alberta. The goal is healthy outcomes for individuals and families, regardless of their means, capacity or social situation.

- **Drug Treatment Courts (DTCs):** CBA supports innovative and responsible approaches to justice, including specialized courts such as mental health, Indigenous, domestic violence, and drug treatment courts. DTCs are pre-sentence treatment programs that seek to rehabilitate non-violent offenders. DTCs divert offenders away from imprisonment on the condition they complete an intensive, judicially-supervised drug addiction recovery program.

- **Judicial Independence:** Provincial Court judges face tough decisions that affect the daily lives, liberty, and security of Albertans. The quality of those decisions will be maintained only if the security of the judges making them is, which impacts the administration of justice for all.

- **Truth & Reconciliation Commission (TRC) Calls to Action:** The Indian residential school system removed 150,000 First Nation, Métis, and Inuit children from their homes, families, communities, and culture – often forcibly – to "civilize and Christianize" Indigenous children by assimilating them into the dominant society. This exposed a sizeable number of Indigenous children to poor living conditions as well as physical, emotional and sexual abuse. Implementing the TRC's Calls to Action will help address these longstanding historical issues.

We met with the Justice Minister as well as opposition justice and solicitor-general critics to introduce them to the above issues. We wrote to political parties for their positions, and asked our members and the public to speak with the candidates on these issues. We held a press conference and received media coverage on our concerns. Finally, we promoted lawyers running in the election: CBA advocates for improvements to law, and knows the value that lawyers bring to Alberta's legislative process. Their respect for detail, understanding of the rule of law, and specialized training in identifying issues and finding solutions, are all important skills that can be used in passing good legislation to benefit all.

At our February AGM, our members approved bylaw changes which give effect to CBA Alberta's new governance model, replacing Council with a Board of Directors and enhanced engagement of the membership. The final Council meeting on May 16 in Calgary will be an opportunity to celebrate and thank those who have been dedicated Council members, as we look forward to what comes next.

Once we receive confirmation of our bylaw registration, we look to hold elections for the eight director board positions so they can begin their work this fall. We invite all to consider whether board service is a way for you to give back. We especially encourage Young Lawyers and members outside of Calgary and Edmonton to consider running, to ensure diverse viewpoints are represented at the board table.

Another quote, this time from Margaret Atwood: "In the spring, at the end of the day, you should smell like dirt"! There are many opportunities for you as a CBA member to give back and get involved. Volunteer opportunities for the coming year open now: committees need people willing to contribute, and Sections are always looking for those able to take on leadership to organize meeting speakers and topics. Finally, the new governance model proposes a Leadership Forum open to all members, an opportunity to learn, network and engage with legal stakeholder groups. Once dates are announced, we will ask you to join us. Let's get our hands dirty together and see what grows!

WHAT'S **HAPPENING**

MAY

15: The Canadian Bar Association presents: **ANNUAL UPDATE ON WORKPLACE SAFETY AND INSURANCE LAW** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19WCB0515X

16: The Canadian Bar Association presents: **LEADING CHANGE: LEADERSHIP DEVELOPMENT BOOTCAMP FOR RACIALIZED LAWYERS** Toronto, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_LEAD19

16: The Canadian Bar Association presents: **MANAGING PARTNER ROUNDTABLE: THE ROAD TO PARTNERSHIP: MANAGEMENT CONTROL** Toronto Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19LPM0516X

21: The Canadian Bar Association presents: **CRITICAL CROSS-BORDER CONSIDERATIONS FOR US-CANADA ESTATE PLANNING** Toronto Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19TRU0521X

22: The Canadian Bar Association presents: **FAMILY LAW TOOLKIT TO ENHANCE YOUR PRACTICE** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19YLD0522X

23: The Canadian Bar Association presents: **NAVIGATE THE WORLD OF BANKRUPTCY PROCEEDINGS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19BKT0523X

23: The Canadian Bar Association presents: **THE MINDFUL LAWYER CPD SERIES: SPRING 2019 MOD 18: RECOGNIZING AND RECOVERY FROM ANXIETY, DEPRESSION AND ADDICTION** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19MIN0523X

26-31: The Canadian Bar Association presents: **CBA TAX LAW FOR LAWYERS CONFERENCE** Niagara-on-the-Lake, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_tax19&_ga=2.71057360.1917292860.1554223421-1184577464.1543440242

27: The Canadian Bar Association presents: **PRIVACY LAW AND THE OLDER ADULT CLIENT: INTERSECTIONS AND ISSUES** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19ELD0527X

29: The Canadian Bar Association presents: **ANNUAL UPDATE ON HUMAN RIGHTS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19CCL0529X

30: The Canadian Bar Association presents: **NAVIGATING ENVIRONMENTAL LIABILITY IN INSOLVENCY AND BANKRUPTCY PROCEEDINGS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19ENV0530X

30: The Canadian Bar Association presents: **LITIGATING COMPLICATED MEDICAL NEGLIGENCE CLAIMS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19HEA0530X

30: The Canadian Bar Association presents: **CBA IP DAY** Ottawa, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_ipday19&_ga=2.133774030.1917292860.1554223421-1184577464.1543440242

30-1: The Canadian Bar Association presents: **CBA IMMIGRATION LAW CONFERENCE** Winnipeg, MB. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_imm19&_ga=2.68190033.1917292860.1554223421-1184577464.1543440242

JUNE

30-1: The Canadian Bar Association presents: **CBA IMMIGRATION LAW CONFERENCE** Winnipeg, MB. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_imm19&_ga=2.68190033.1917292860.1554223421-1184577464.1543440242

10: The Canadian Bar Association presents: **17TH ANNUAL OSC, TSC, AND IIROC UPDATE** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19BUS0610X

11: The Canadian Bar Association presents: **TIPS FOR BUILDING YOUR OWN LITIGATION PRACTICE** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19CIV0611X

11: The Canadian Bar Association presents: **PROTECTING YOUR CLIENT AND YOURSELF WHEN THE TRANSACTION GOES BAD** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19RPR0611X

19-21: The Canadian Bar Association presents: **CBA ABORIGINAL LAW CONFERENCE** Banff, AB. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_abl19&_ga=2.163011452.1917292860.1554223421-1184577464.1543440242

20: The Canadian Bar Association presents: **NEW TECHNOLOGY AND THE FUTURE OF THE CANADIAN CONSTRUCTION INDUSTRY** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_ONMAY119

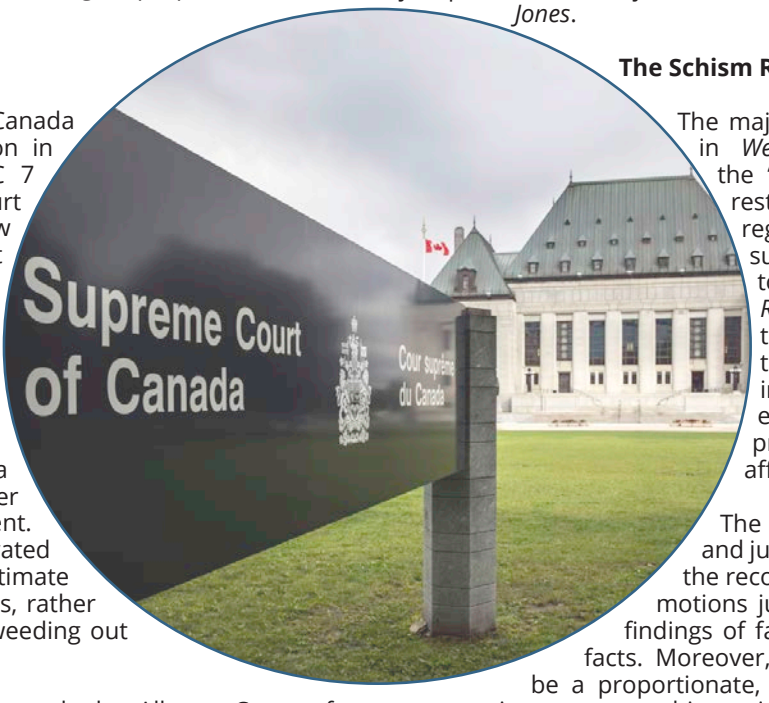
THE "MYTH OF TRIAL" REBORN: **ALBERTA COURT OF APPEAL RESTATES THE TEST FOR SUMMARY JUDGMENT**

BY **MICHAEL O'BRIEN**

On February 6, 2019, a five-justice panel of the Alberta Court of Appeal issued its eagerly awaited decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 ("*Weir-Jones*"). Since 2014, the legal test for summary judgment has been in flux in Alberta, largely as a result of contradictory decisions from the Alberta Court of Appeal. In *Weir-Jones*, the Court of Appeal took the opportunity to restate the test for summary judgment in Alberta, providing much needed certainty to litigants seeking a proportionate and timely end to disputes.

The Schism in Alberta Law

In 2014, the Supreme Court of Canada released its landmark decision in *Hryniak v Mauldin* 2014, SCC 7 ("*Hryniak*"), in which the Court invigorated and breathed new life into summary judgment as a method of dispute resolution. *Hryniak* is the case where the Supreme Court of Canada famously spoke about the "cultural shift" away from the trial and towards efficient and cost-effective summary procedures. *Hryniak* adopted a new test that made it far easier to obtain summary judgment. In doing so, *Hryniak* elevated summary judgment as a legitimate mechanism to resolve disputes, rather than simply being a tool for weeding out unmeritorious lawsuits.



Shortly after *Hryniak* was released, the Alberta Court of Appeal adopted it as the test for summary judgment in Alberta in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108. The *Windsor* case used equally sweeping language to describe the change in the test for summary judgment, declaring that the "myth of trial" should no longer govern civil lawsuits. According to *Windsor*, if a court can reach a fair disposition of the matter on the record before it, summary judgment should be utilized.

However, shortly after the *Windsor* decision was released, there were a few decisions from the Alberta Court of Appeal that began to revert to the pre-*Hryniak* and pre-*Windsor* case law. Specifically, those cases increased the standard of proof that must be met by a party applying for summary judgment by rejecting the typical civil standard of proof – balance of probabilities – and instead requiring the applicant to demonstrate that they had an "unassailable position." The "unassailable" standard made obtaining summary judgment virtually impossible in all but the clearest of cases.

During this same period, other decisions from the Alberta Court of Appeal continued to follow *Hryniak* and *Windsor* and did not even mention the "unassailable" standard. As a result, for the last five years, a schism or rift emerged in Alberta jurisprudence regarding the standard of proof that must be met by the party moving for summary judgment. The two approaches to summary judgment stood in stark juxtaposition. Lawyers (as well as lower courts) were left second guessing what the appropriate test for summary judgment was in Alberta.

In order to settle the law, and hopefully resolve the rift in the jurisprudence, a five-justice court was impaneled to hear *Weir-Jones*.

The Schism Resolved?

The majority of the Court of Appeal in *Weir-Jones* decisively rejected the "unassailable" standard and restated the law in Alberta regarding the availability of summary judgment pursuant to Rule 7.3 of the Alberta *Rules of Court*. In doing so, the majority returned to the principles articulated in *Hryniak* and *Windsor* and embraced the need for more proportionate, timely, and affordable procedures.

The majority held that for a fair and just determination to be made, the record and issues must allow the motions judge to make the necessary findings of fact and apply the law to the facts. Moreover, summary disposition must be a proportionate, more expeditious, and less expensive means to achieve a just result.

After a review of the core principles relating to summary judgment, the majority delineated the key considerations in determining whether summary judgment is appropriate, as follows:

> **(a) Genuine Issue Requiring a Trial.** Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record, or the law reveal a genuine issue requiring a trial?
>
> **(b) Standard of Proof.** Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level, the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> **(c) Shifting Burden.** If the moving party has met its burden, the resisting party must put its best foot forward and

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demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

(d) Judicial Discretion. In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

The majority clarified that the above criteria are not sequential in nature. The presiding judge may determine that summary adjudication is inappropriate or unfair at any stage of the analysis.

Conclusion

Summary judgment is a critical tool for litigants seeking an early resolution to disputes. In *Weir-Jones*, the Alberta Court of Appeal has moved to resolve the rift in the case law and to bring clarity and certainty back to the test for summary judgment. Time will tell how courts will interpret and apply *Weir-Jones*, however, at this point, it appears that summary judgment has been reinvigorated and will take its rightful place as an important dispute resolution strategy in Alberta law.

Photo: iStock-858283078

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NEW CASE LAW ON TAX LIABILITY **FOR TRANSFERS OF PROPERTY FROM A TAX DEBTOR**

BY **GERGELY HEGEDUS**

A recent case from the Tax Court of Canada has shed light on who has the onus of establishing the correctness of an underlying assessment issued pursuant to section 160 of the *Income Tax Act*.

Section 160 of the *Income Tax Act* permits the Minister of National Revenue ("Minister") to assess a person who receives property ("Transferee") from a tax debtor ("Transferor") for the taxes that are owed by the tax debtor if the following four conditions are met:

1. There must be a transfer of property.

2. The Transferor must have a tax liability at the time of the transfer.

3. The property must be transferred for less than fair market value.

4. The Transferee must be (i) the Transferor's spouse, or common law partner, (ii) a person who was under 18 years of age, or (iii) non-arm's length to the Transferor.

If these four conditions are met, then the Transferee can be held liable for the Transferor's tax up to the amount by which the fair market value of the property exceeds the consideration provided by the Transferee.

A person assessed under section 160 of the *Income Tax Act* can challenge the underlying assessment of the Transferor (tax debtor). In past jurisprudence, it was unclear who had the onus of establishing the correctness of the underlying assessment. The Tax Court of Canada has helped to clarify this issue in the recent case of *Monsell v. Her Majesty the Queen*, 2019 TCC 5.

As noted in *Monsell*, the general rule in tax appeals is that the taxpayer bears the onus of establishing that an assessment or reassessment is incorrect. However, in certain circumstances, "where the facts concerning the underlying reassessments are exclusively or peculiarly within the knowledge of the Minister, the onus will shift to the Minister to show the correctness of the underlying reassessments."

In Monsell, the appellants, Peter Molander and Tammy Monsell, were a husband and wife. In 2007, Peter and Tammy each received $15,000 and $41,500, respectively, from a corporation ("Corporation"). Peter's mother was the sole director and shareholder of the Corporation. According to the Minister, the Corporation had a tax debt arising from its 2005, 2006 and 2007 taxation years. The Minister assessed the appellants under section 160 for tax owed by the Corporation.

Mr. Molander testified that he was only involved in the marketing and the sale side of a joint venture and the Corporation was one of many participants. Furthermore, he was not involved in the administration, accounting or preparation of corporate income tax returns for the Corporation's 2005, 2006, and 2007 taxation years.

The Court found that the CRA was at one time in custody and control of the Corporation's documents for the 2005 and 2006 taxation years, and the CRA was no longer capable of retrieving these documents because they had become lost or destroyed. The Court also found that the appellants never had control or access to the Corporation's tax records for the 2005 and 2006 taxation years. Therefore, the Tax Court ruled that the Minister had the burden of establishing the correctness of the underlying corporate reassessments for the 2005 and 2006 taxation years.

The Court further found that the appellants had access to the Corporation's tax return for the 2007 taxation year and the Minister assessed the Corporation based on its tax return for this taxation year. Since the appellants had access to the documents from which the underlying tax debt arose, the Court determined that the appellants had the onus of establishing that the Minister incorrectly assessed the Corporation for the 2007 taxation year.

If a person never had access and control over the documentation from which an underlying assessment arose, then the onus would likely be on the Minister to establish the correctness of an assessment. However, if a person has or had access to these documents, then he or she will likely bear the burden of proving that the assessments are incorrect.

This is a unique case where the taxpayers did not have access to the documents supporting the underlying assessment because the CRA had lost or destroyed them. This case may support a taxpayer's defence to an assessment in other situations where he or she has no knowledge of the underlying facts or documents that support an assessment. For example, the defence may be applicable to a director's liability assessment where the director was an outside director who did not have access to the corporate books and records due to a falling out with the other directors of a corporation.

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In any event, it is important for clients to understand that if they receive property from a tax debtor who is a spouse, child, or someone they do not deal at arm's length with, then they too may be held liable for the tax debt of that person if they do not provide proper consideration for the transfer of property.

Photo: Mari Helin, Unsplash

GERGELY HEGEDUS recently joined the Tax Group of Dentons Canada LLP in Edmonton, Alberta after working for nine years at the Department of Justice Canada's Tax Law Services section. His work focuses on tax dispute resolution and litigation.

LET'S NOT TURN THE SNC-LAVALIN AFFAIR INTO A **BAR EXAM HYPOTHETICAL**

BY **DAVID SLAVICK**

The SNC-Lavalin affair seems uniquely designed to evoke interest in the legal mind. The complexities of Deferred Prosecution Agreements, questions regarding the chain of command in the bureaucracy, and the independence of the Attorney General's office all are the sorts of niggling legal minutiae that excite and titillate legal thinkers. The SNC-Lavalin affair has become a beautiful bar exam hypothetical, throwing a checklist of legal issues from across the many silos of legal regulation into one steaming hot pot of stew, seasoned liberally with political machinations.

Lawyers are justifiably intrigued. Lawyers like puzzles. But legal minds have to ask themselves if they are interested in this issue because it is important to them or if they are interested because it is legally interesting. That distinction in the age of the infotainment legal podcast and true crime documentary is one that legal thinkers must parse out. We cannot let our desire to unravel a mystery colour our understanding of to what extent "normal" politics should be pathologized through the lens of legal regulation.

The lawyerly ability to divorce oneself from political considerations is super-human in many ways given that the political is personal and that law is the memorialization of politics. The way we organize our lives is full of political decision making but the pseudo-objectivity of calling balls and strikes is a lens we must try to escape.

Is the SNC-Lavalin affair legally interesting? Absolutely. Is it a legal scandal? Probably not. Yes, it seems untoward that the Attorney General and Minister of Justice positions are intertwined. Yes, the legislation on deferred prosecution agreements seems vague around issues of local economic impact versus national impact. Yes, the palace intrigues of who met who, when, at the Fairmont Château Laurier does feel like unraveling a spy case. These things can all be true without the need to seek out a legal solution to what is distasteful but run of the mill politics in Ottawa, Washington DC, or any other centre of power.

It is appealing to look at the seeming nuances of the political process and the aspects of that process that fail to conform to our understanding of legal norms and to get the gut sense that there is something deeply illegal occurring. That would be in many ways satisfying; we enter into the legal profession because we feel the law is a way to make meaning of the world. Sadly, there are many times the world is too messy to organize in that way. Grey areas develop in the cracks of the regulation of behaviour – that is the stuff of life, that is where politics live and law finds its powers diminished. That doesn't have to be a bad thing. The limitations of law allow us to see where politics reside and it is in politics that we can change the world, not just change the law. It is, in fact, an election year, and it is in these years that we can determine where the country is headed. Just as we cannot have politics stand in for law, we cannot let the law stand in for politics.

DAVID SLAVICK is a former adjunct law professor at Elon University School of Law, a former political consultant and DC think tank staffer, Canadian in-training, producer of *The Michael Brooks Show*, and co-host/producer of the *Heidi Matthews On Demand Podcast.* Find him on Twitter @davidslavick

THE SNC-LAVALIN AFFAIR: **WHY GOVERNMENT ARE NOT ANGELS**

BY **LEONID SIROTA & MARK MANCINI**

Attorney General Jody Wilson-Raybould was shuffled out of her office, and then resigned from cabinet; fellow minister Jane Philpott resigned too, and so have Gerald Butts, the principal secretary to the Prime Minister, and Michael Wernick, the Clerk of the Privy Council. Ms. Wilson-Raybould and Dr. Philpott have now been expelled from the Liberal caucus. Indeed, the Trudeau government's future is seemingly imperiled by the SNC-Lavalin scandal. In the unflattering light of these events, Canadians may rightly wonder about the way our government works.

It appears that many of the key decisions in the affair were made by the Prime Minister's surrogates, who had no regard for the legality of the situation, but were only too happy to advance a political agenda. While the situation is still unfolding, one can already see that it has revealed significant challenges faced by all three branches of our government, and the defects in the ways in which they relate to one another.

Most fundamentally, the SNC-Lavalin affair requires us to take a grittier view of the way government works in Canada. As one of us wrote on our blog, *Double Aspect*, government in the 20th century was widely perceived as a means to achieve certain substantive ends associated with the social welfare state. The basic mythology held that, to break the "individualistic" mould of a judicially-developed law focused on upholding property rights and private contractual arrangements, Parliament and legislatures enacted complex legislation, to be administered by expert and efficient tribunals and agencies nested within the executive branch but more or less independent from the supervision of its political masters. This delegation was meant to remove from courts issues of collective justice deemed ill-suited for judicial resolution. The courts, meanwhile, were given a different but even more prestigious role: that of upholding a confined but elastic range of (mostly) non-economic individual rights and liberties.

This rather Pollyannaish view of government persists today. The executive and agencies are seen as trustworthy technocrats, entitled to judicial deference (regardless of the absence of any real empirical evidence to support this view); Parliament, as the high-minded centre of political representation (at least so long as it is controlled by parties sympathetic to the redistributive project) and accountability; and the courts, as the protectors of the rights of minorities. The SNC-Lavalin affair provides strong evidence that this picture is naïve.

* * *

The executive branch of government, it turns out, is not only populated by neutral, technocratic arbiters of policy. Rather, politically-minded actors, people like the Prime Minister's former Principal Secretary, lurk in the shadows—and consider themselves entitled to really call the shots. These are the people who, in the face of an Attorney General's refusal to cede to the Prime Minister's pressure, said that they did not want to talk about legalities. They were ready to line up op-eds in newspapers to provide cover fire for their dismissive attitude toward law and discredited legislation adopted by a previous Parliament in which their party did not control the seats.

Instead of being guided by the law, or even (their own conception of) justice, these unelected, unaccountable apparatchiks are only motivated by the prospects of electoral success. Their empowerment means that even those decisions of the executive branch that are ostensibly protected by constitutional principles and conventions mandating their independence (like the prosecutorial function), are perceived as always up for grabs, according to the demands of political expediency.

Meanwhile, some civil servants are quite prepared to act as the political hacks' supporting cast, instead of standing up for rules and procedures. Mr. Wernick, the former head of the civil service, certainly was, having apparently had no compunctions about relaying the Prime Minister's unconstitutional threats to the former Attorney-General and persisting when she warned him of the inappropriateness of his behaviour.

But what of Parliament's role in fostering accountability? Here, again, one should not be too optimistic. A government that has the support of a majority of members in the House of Commons will also command a majority on, and thus control the work of, Select Committees, which are key to ensuring that the government is held to account beyond the limited opportunities afforded by the spectacle of question time. Admittedly, the committee supposedly looking into the SNC-Lavalin affair has let the former Attorney General present her version of the events, and it has made public the further documents she supplied, including the damning recording of one of her conversations with Mr. Wernick. Yet the committee is still resisting the calls to allow Ms. Wilson-Raybould to appear again to respond to Messrs. Butts and Wernick's subsequent attempts to discredit her.

Parliament's role as a locus of accountability is further compromised by the restrictions on what Ms. Wilson-Raybould is able—as a matter of ethics, at least—to say, even under cover of Parliamentary privilege. The problem is twofold. First, there is some debate about whether Parliamentary procedure would provide the former Attorney General an opportunity to speak despite the opposition of her former party colleagues. Second, even if such an opportunity is available, there is the matter of cabinet privilege, which in principle binds former (as well as current) ministers, even when they speak in Parliament. The Prime Minister could waive privilege, in this case, to allow Ms. Wilson-Raybould to speak freely, but he is refusing to do so.

Finally, the judiciary is unlikely to come out well of the SNC-Lavalin affair—even though it is not directly involved. For one thing, someone—and it is not unreasonable to suppose that that someone is not very far removed from the Prime Minister's entourage or office—has seen it fit to drag a respected sitting judge, Chief Justice Joyal of the Manitoba Court of Queen's Bench, through the mud in an attempt to cast aspersions on the former Attorney General. (One of us, we should perhaps

THE SNC-LAVALIN AFFAIR: **WHY GOVERNMENT ARE NOT ANGELS**

BY **LEONID SIROTA & MARK MANCINI**

note, has been more critical than the other of that judge's views. In any case, the insinuations that Chief Justice Joyal would not follow the constitution are based on, at best, a fundamental misreading of his extra-judicial statements.)

But beyond that deplorable incident of which a sitting judge has been an innocent victim, it is the former members of the judiciary whose standing has been called into question. In particular, it is worth noting that Mr. Wernick, in his conversations with Ms. Wilson-Raybould, seemed to have no doubt that the former Chief Justice would be able to provide support for the Prime Minister's position—despite his repeated acknowledgements that he was no lawyer. There is no question that the former Chief Justice, and other former judges involved in or mentioned in connection with the SNC-Lavalin affair, were independent while they were on the bench. Yet their willingness to become hired guns once retired, and perhaps to take aim in accordance with the government's commands, is still disturbing.

* * *

One view of the matter is that—despite the gory appearances it projects and creaky sounds it makes—"the system works." As Philippe Lagassé wrote in Maclean's, referring to James Madison's well-known remark in Federalist No. 51 that "[if] men were angels, no government would be necessary," the test of a government is not whether its non-angelic members turn out to be fallible, and sometimes unethical, human beings, but whether "our constitutional constructs include checks and balances to deal with their naturally occurring slip-ups."

And perhaps the SNC-Lavalin affair ought to give new light to the idea that responsible government—and its attendant norms of political accountability and control of the executive by Parliament—provide adequate checks and balances for government in the 21st century. Despite the limitations on Parliament's ability to hold the government to account, the opposition party has been able to whip up sufficient public scrutiny to force the hand of the incumbent ministry. Notably, the exposure of the roles played by Messrs. Butts and Wernick is a consequence of the opposition's pressure—as well as, arguably, of the ability of the media, old and new, to involve experts capable of explaining complex constitutional issues in the discussion of political events. Perhaps, if public attention to aspects of our system that we typically do not consider can be sustained once the interest in the scandal at hand subsides, the system will even come out of it stronger than it was, especially if Parliament can, henceforth, put its mind to holding the executive accountable for its exercise of the powers Parliament has delegated to it.

But this view may well be too optimistic. Just a couple of sentences before his "if men were angels" quip, Madison issued a no less famous exhortation: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." The worry is that our constitutional set-up fails to adequately establish this connection; that it does not guarantee that ambition will counteract instead of abetting ambition; and it relies too much on human character being, if not angelic, then unusually virtuous.

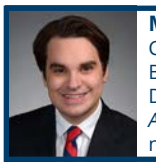
As Dr. Philpott observed in a statement following her expulsion from the Liberal caucus, "[i]t is frankly absurd to suggest that I would leave one of the most senior portfolios in government for personal advancement." Similarly, it seems most unlikely that Ms. Wilson-Raybould would have taken the principled stand she took, rather than doing the bidding of Messrs. Butts and Wernick and the Prime Minister himself, had she been the ordinarily self-interested politician. The ambitious thing to do for someone in her position would have been to take a hint, and to do as she was told.

And what would have happened then? Sure, her decision to overrule the Public Prosecution Service and to make a deal with SNC-Lavalin would have had to be published, and would have generated some negative publicity. But friendly journalists marshaled by Mr. Butts, and perhaps the former Chief Justice too, would have provided cover. It seems reasonable to suppose that the SNC-Lavalin affair, if we would even have been calling it that, would have been over already, and almost a certainty that it would not have become the major political event that Ms. Wilson-Raybould has made it.

In other words, it is at least arguable that whether fundamental constitutional principles are upheld by our government turns rather too much on individuals doing the right thing under great political pressure, and despite their self-interest. It is to Ms. Wilson-Raybould's credit that she has acted in this way. But it seems unwise, to say the least, to rely on her successors always following her example, or to suppose that her predecessors always have set a similar one.

A more realistic view of government, and of its more or less visible denizens, may thus lead us to conclude that all is not well with our constitutional system. In one respect, Madison (in Federalist No. 48) turned out to be wrong. It is not the legislative branch but the executive that "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Law enforcement, Parliament, and perhaps even the judiciary, are endangered by its obstruction, threats, and promises of favours. We must recognize the difficulty to have the slightest chance of doing anything about it.

LEONID SIROTA teaches at the Auckland University of Technology Law School. He is a graduate of the McGill University Faculty of Law and NYU Law School and the founder of the *Double Aspect* blog.



MARK MANCINI is an LL.M. student at the University of Chicago Law School, a graduate of the University of New Brunswick Faculty of Law, and the incoming National Director of the Runnymede Society. He blogs at the *Double Aspect* blog. The views expressed in this piece do not necessarily represent the views of the Runnymede Society.

LOOKING UNDER THE HOOD OF THE **CONSTITUTIONAL MECHANICS OF ABORIGINAL LAW**

BY **CHRISTINA GRAY**

On the morning of April 2nd, 2019, I sat down for a video call with Assistant Professor and constitutional law expert, Joshua Nichols (University of Alberta, Faculty of Law). We had a candid discussion about some of the major underlying issues concerning Aboriginal law and the constitutional framework of section 35. Professor Nichols provided insightful glimpses into the inner-workings of the Canadian constitutional machine and the 'mechanics' of s. 35 Aboriginal and treaty rights. Keep reading to find out more:

CG: How do you think Indigenous people — including Indigenous people's legal principles or laws or rights — fit within a liberal democracy?

JN: Instead of bigger questions of ought or should, it is more helpful to look at how they are currently, to get a clearer picture of what's the case now. For example, Indigenous peoples are seen as a minority within the larger population. That then leads the courts to address Indigenous peoples with the tool box of Charter rights.

CG: Can you give us a specific example?

JN: It's best to start with *R v. Sparrow* because that's where this move is made within the Canadian constitutional framework. It is the first case to interpret s. 35 and give meaning to it. It is too easy as lawyers to be familiar with the mechanics of s. 35 that grow out of *Sparrow* and then forget the background assumptions it relies on. We don't see the case with fresh eyes; we see the case that has been around for nearly 30-years. There is a natural forgetting happening about what the Court held in *Sparrow*.

Instead we tend to look at recent authorities and go forward. The courts do this too. Here is a current statement from the B.C. Supreme Court in *Ahousaht* (https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc633/2018bcsc633.html). When talking about s. 35, Justice Humphries writes, at para 59:

> This section is not contained within the *Charter of Rights and Freedoms* and not subject to the *Charter*, s 1. Thus the courts have created another way to deal with the interaction and reconciliation of government objectives and sovereignty with aboriginal rights.

That is well and good but begs the question of how the courts came up with this? And what are the premises that they are operating on to legitimize this interpretation of the constitution? It jumps over that entirely. It is only describing what they've done. I'm not convinced that the court has a clear eye on the mechanics of what they've done and what it has to assume legally in order to make sense. So, the doctrine is very muddy.

If we go back to *Sparrow*, it says the same thing. The Court there explicitly says that they recognize s. 35 on its face within the scheme of the document is not part of the *Charter*. It is outside of the realm of the *Charter*. And so, s. 1 doesn't apply and neither does s. 33, the notwithstanding clause. If we were to just read the document as lawyers, we would quickly see that whatever s. 35 is, it's not an infringeable Charter right. It's more along the lines of a jurisdictional line, similar in kind to ss. 91 and 92 of the *British North America Act* of 1867. The problem looking at it in the eyes of a lawyer or judge is that it contains no enumerated heads of power, as s. 35 says, "existing Aboriginal rights and treaty rights are recognized and affirmed." As a lawyer, one understands that on the first reading this suggests that all legislation from any other branch of government that relates to Aboriginal and treaty rights is going to be null and void — ultra vires — because this is constitutional law — the highest law — and there is no reasonable basis within that document to empower the Courts to infringe that right. What you're looking at from the eyes of the common law is a potential legal vacuum. A kind of seizure within the constitutional machinery that would prevent that machinery from being able to operate and apply law. I think that is the situation the court in Sparrow felt itself to be in. They went into unwritten principles, much like the Court did later in the *Seccession Reference*, but with very different principles. They claimed that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the crown" and they based this on the doctrine of discovery via their citation of *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.). This is the actual basis of their reading of s. 91(24) as "federal power" over "Indians and lands reserved for Indians."

CG: What principles do you think they are talking about?

JN: This is the first time they use 'reconcile' within Canadian law. When we are talking about 'reconciliation' we should get rid of the normal everyday sense of the word, coming together after a conflict and reaching an understanding, which is a basic understanding of the word. Understand that the judges in that case were 'reconciling' two documents together. That is more like reconciling economic books. It's a solo exercise.

CG: Like an accountant?

JN: Like an accountant, like a legal accountant.

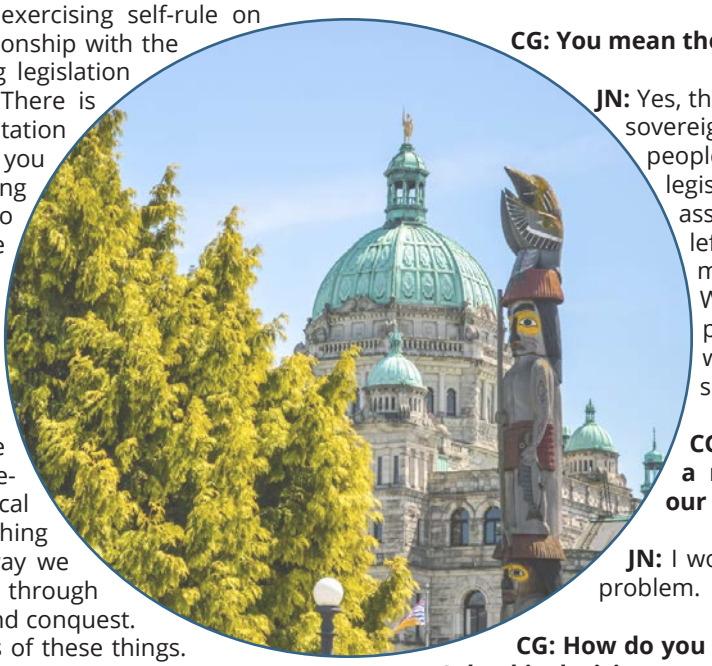
What the Court in *Sparrow* reconciles is the "federal power" under s. 91(24) — which, again, is predicated on the thin air of the doctrine of discovery — with federal duty, what they now colour s. 35. In the colouring of the duty, they painted in a particular way that foreshadows what's going to happen in this balancing exercise. This is because the character of the power that they've characterized under s. 91(24) is absolute; it is power over "Indians and lands reserved for Indians." Necessarily that begs the question, where did this power come from? It is a strange thing because we can see that there is an enumerated head of power in the *BNA Act*, but the immediate reading of this phrasing and subheading says "power in relation to," which does not give us the proper character of what this power is. It could be a minimal federal right to make

LOOKING UNDER THE HOOD OF THE **CONSTITUTIONAL MECHANICS OF ABORIGINAL LAW**

BY **CHRISTINA GRAY**

agreements with 'Indians' and a kind of plenary responsibility in relation to 'Indian lands.' By plenary responsibility, I mean the relationship would be between Indigenous nations and the Federal government, with provinces not having a direct legal role in the relationship. The *Penner Report* made a very similar recommendation when they suggested that the federal government should "occupy and vacate" s. 91(24). This move preserves the federal arrangement that was set out in the Royal Proclamation of 1763 and that many Indigenous nations agreed to in the Treaty of Niagara in 1764.

But there are other available interpretations. Indigenous groups could, for example, be exercising self-rule on their territories that have a relationship with the federal government and creating legislation by negotiation and agreement. There is not a natural immediate interpretation of the plain text of s. 91(24), but you must conduct a contextual reading of a constitutional document to get its colour. We know that we need to read constitutional text within the scheme of the act; this is the modern principle. The *Sparrow* court jumps over all that and gives it absolute power over land and land reserved for Indians. The question is: where did they get that power? The pre-existing relationship of the historical treaties do not delineate anything resembling that, and the only way we apply sovereignty and prove it is through treaty, negotiated agreements, and conquest. We specified technical definitions of these things. We have no evidence of conquest, but we have lots of evidence of treaties. The court in *Sparrow* does not provide us with a clear view of how they assume that power, but tell us that there was never any doubt that the crown is sovereign, has legislative power, and underlying title.



As lawyers, we are often trained that courts are bound to acknowledge crown sovereignty. They have to — it's part of judicial notice and it's considered non-justiciable. If the courts question the sovereignty of the crown then they run into contradiction because they question their own jurisdiction, as that is where their own jurisdiction flows from. But courts have a responsibility to determine the legal qualities that flow from their recognition of crown sovereignty. It is not a one size fits all concept. They can and must presume a degree of sovereignty. For example, they can say that the crown is sovereign within Canada and its territorial bounds, but complicate the inner-structure of that sovereignty. What are the federal arrangements of legislative power? Who are the stake holders of underlying title? Is it co-underlying in some instances? These aren't presumptions that naturally flow from the concept of sovereignty; Rather, these presumptions are — within a federal system — the very subjects of negotiations as to how the federation functions. If one party has sovereignty, legislative power, and underlying title, then you've already presumed the structure of federalism and you've done it through judicial notice. Judicial notice has common law limits. Whatever a judge notices must respect the division of powers and must preserve their judicial neutrality. In this instance, we have a recognition of crown sovereignty that accepts the crown's picture of what it has on bare assertion alone and ignores Indigenous peoples' view of what they have. The crown has pushed it way too close to the executive. It has lost the appearance of judicial neutrality.

CG: You mean the Court?

JN: Yes, the court. This thick version of crown sovereignty closes off space for Indigenous peoples within the federation, since legislative power has been completely assigned to the crown. The only space left is devolved powers, like that of municipalities and *Charter* rights. We have to remember that the presumption in *Charter* rights is that we are dealing with the rights of subjects to a sovereign.

CG: That's interesting because I'm a member of Lax Kw'alaams and our chief changed his title to mayor.

JN: I would see that as a symptom of the problem.

CG: How do you interpret the *Tsilhqot'in v. British Columbia* decision — and its granting of Aboriginal title — in light of your observations about *Sparrow*?

JN: In *Tsilhqot'in*, Aboriginal title is proven for the first time, it moves from being a theory to a reality. However, I take issue with many parts of the doctrine of discovery and terra nullius in that case.

The s. 35 framework that started with the conflict in *Sparrow* similarly plays out in this decision. The problem is that the framework that gets set up is predicated on the assumption that the crown has all the levers of power within the order. The only area available is a quasi-municipal form of governance within some constitutional plating, which must be proven within litigation and recognized within the courts. Indigenous peoples have for the last 250 years — but especially the last 150 years when the relation is fundamentally changed unilaterally — continually advocated not for *Charter* rights in relation to their sovereign, but argued for jurisdiction as founding partners of Confederation. This is a disconnect in the vocabulary of the courts from *Sparrow* and Indigenous peoples, who keep asking for jurisdiction, and they respond that you can have rights that

Continued from p.13

are infringeable — unilaterally — subject to their justification tests. This contradiction between perspectives has played itself out again and again in how the court ends up in these strange grounds asking what exactly is Aboriginal title? It is so sui generis that it is difficult to fit within a common law frame. Similarly, what is a commercial scale fishing right, for example under s. 35? Commercial scale fishing rights should be possible according to the test of *R v. Vanderpeet*, but the problem is that judges can re-characterize the right. For example, the legal test — "integral to the distinctive" — Indigenous peoples can litigate this for a decade and they'll hit it, but then when they do all of a sudden, the targets move, which has been so clearly illustrated with the most recent *Ahousaht* decision.

Aboriginal and treaty rights offer complex constitutional narratives, as Professor Nichols and I discussed in relation to the recent Ahousaht case, R v. Sparrow, and Tsilhqot'in v. British Columbia. For more on this, read Professor Nichols illuminating work. He has published a recent article in the Alberta Law Review on the duty to consult and accommodate. Further, he has a forthcoming book being published with the University of Toronto Press, and a forthcoming article in the Osgoode Hall Law Journal about treaty interpretations in Canada and their underlying presumptions.

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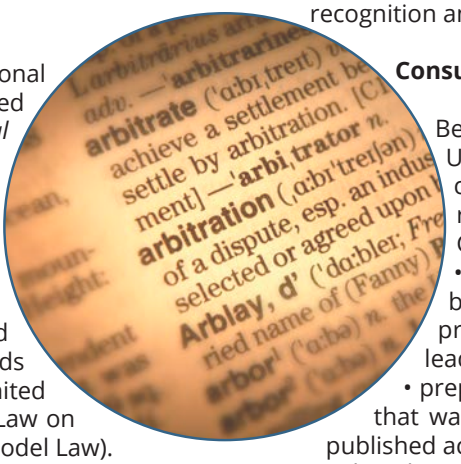
UNIFORM INTERNATIONAL **COMMERCIAL ARBITRATION**

BY **KATHERINE MACKENZIE**

In April 2019, the Alberta Law Reform Institute (ALRI) published Final Report 114: *Uniform International Commercial Arbitration*. This report recommends changes to international commercial arbitration practice in Alberta.

International commercial arbitration is an alternative dispute resolution mechanism generally used in business transactions that involve a foreign element. It is a consensual process whereby international parties agree to submit their dispute for adjudication by a neutral, third party decision maker. One of the main advantages of international commercial arbitration is that it allows parties to avoid litigating their disputes before foreign courts.

Alberta's Current Framework



In Alberta, the practice of international commercial arbitration is currently governed by three sources. Alberta's *International Commercial Arbitration Act* (the Alberta Act) establishes the basic legislative framework for the conduct of international commercial arbitration in this province. Enacted in 1986, the Alberta Act implements two United Nations initiatives: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the United Nations Commission on Trade Law Model Law on International Commercial Arbitration (the Model Law).

The New York Convention establishes the rules by which jurisdictions will summarily recognize and enforce foreign arbitral awards, while the Model Law sets out the fundamental rules for conducting international commercial arbitrations. Both the New York Convention and the Model Law are appended as schedules to the Alberta Act.

Why is Reform Required?

Alberta law should provide for the most effective and modern international commercial arbitration system. Unfortunately, the Alberta Act is outdated. It was enacted in 1986 and has not been significantly updated since. Further, in 2006, the United Nations Commission on Trade Law made amendments to the Model Law, which have never been formally incorporated into Alberta law. The absence of the 2006 amendments has put Alberta's reputation as a Model Law jurisdiction at risk. As such, the main impetus for reform is to implement the 2006 amendments made to the Model Law.

The Uniform Approach

Uniformity — both within Canada and internationally — is extremely important in this area. Uniformity promotes familiarity with and ease of use of our arbitration infrastructure by foreign commercial interests. Recognizing this, the Uniform Law Commission of Canada (ULCC) has played a central role in promoting and facilitating the uniform implementation of the New York Convention and the Model Law across Canada. In 1986, the ULCC produced a model Uniform International Commercial Arbitration Act (Uniform Act 1986) and recommended its use for this purpose. Almost every provincial international commercial arbitration statute, including the Alberta Act, is based on the Uniform Act 1986.

In 2014, the ULCC revised its Uniform Act 1986 and created the Uniform Act 2014. The primary motivation for this revision was to adopt the 2006 Model Law amendments. The ULCC also sought to address some practical difficulties arising from case law or differences in arbitration practice across the country. Finally, it examined the important issue of whether there should be a harmonized cross-Canada limitation period for the recognition and enforcement of foreign arbitral awards.

Consultation Activities

Before creating the Uniform Act 2014, the ULCC conducted an extensive, cross-Canada consultation. After completing considerable research and analysis, the ULCC Working Group:

- obtained input from a large advisory board consisting of experienced arbitration practitioners, academics and institutional leaders;
- prepared a widely-distributed discussion paper that was discussed at conferences in Canada and published across Canada, the USA and the UK; and,
- produced a Final Report and Uniform Act 2014.

Due to the ULCC's consultative efforts, the extensive cross-country input already reflected in the Uniform Act 2014, and the specialist nature of this area of practice, ALRI chose not to issue a Report for Discussion in this project. Rather, ALRI convened a Project Advisory Committee comprised of some of Alberta's leading practitioners and academics in the area of international commercial arbitration. The Committee provided advice and input on early drafts of the Final Report and assisted enormously with the fine-tuning of ALRI's ultimate recommendations.

Final Report 114: Key Proposal

ALRI recommends that the Uniform Act 2014 should be adopted in Alberta, with a few minor adjustments. The biggest changes that this will entail are the implementation of the 2006 Model Law amendments and the institution of a harmonized, cross-Canada limitation period for the recognition and enforcement of foreign arbitral awards.

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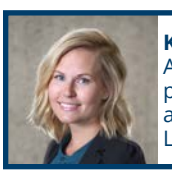

KATHERINE MACKENZIE is Legal Counsel at the Alberta Law Reform Institute. Before joining ALRI, she practiced family law in Edmonton, Alberta. She has also worked at the Alberta Court of Appeal and the Legislative Reform Department at Alberta Justice.

THE ETHICS OF **FORMER JUDGES RETURNING TO PRACTICE**

BY **NANCY CARRUTHERS**

The activities of former judges have been a recent focus of attention, particularly as a result of the involvement of former SCC judges in the SNC Lavalin matter.

The Canadian Judicial Council ("CJC") is also in the news, as it seeks to modernize the Ethical Principles for Judges. The CJC is conducting an online survey, seeking feedback about six major themes: social media; public engagement; dealing with self-represented litigants; case management; settlement conferences and judicial mediation; professional development; and post-retirement activities. The last theme is the focus of this article.

The Federation of Law Societies ("Federation") has been studying post-judicial return to practice since 2016. The most recent proposal to revise the Model Code included a ban on law firms communicating with sitting judges about post-retirement employment opportunities, as well as a ban on former judges appearing before any Canadian court or tribunal, unless permitted by the governing law society. Permission would only be granted in exceptional circumstances, taking into account the length of time the former judge sat on the bench, the length of retirement, the scope of proposed practice, and the jurisdiction in which the former judge presided.

The ban on employment discussions with sitting judges is meant to prevent speculation that the firm where the retired judge goes to work may have been in a favoured position while the judge was on the bench. In the United States, employment discussions with a sitting judge would be allowed, as long as the employing firm did not have a matter before the judge. The American approach reflects the current standard in Canada. Retired judges, and the firms where they practice after retirement, seem well aware of the conflict rules that would prevent them from making an employment offer to a judge before whom they have a current litigation matter.

The restrictions on appearing in court are more controversial. While the Federation has not proposed a ban on former judges returning to practice, the proposed Model Code amendments would prevent former judges from appearing before courts or tribunals. They could, however, consult in the background, and many former judges do just that as part of their practices, along with providing valuable mentorship within their firms.

The current Alberta framework allows former judges or masters in chambers to return to practice after leaving the bench, although they are not allowed to appear in chambers or court without Bencher approval. In 1998, the Benchers established that, as a condition of returning to practice, retired

judges may not be referred to as former judges in any court appearance or court document.

In 2000, the Benchers established a guideline for considering applications by former judges returning to practice. The guideline suggested a six month "cooling off" period for Provincial Court judges, and a two year cooling off period for the judges of other superior courts. Lawyers who retire after less than three years on the bench might be allowed to appear in court after one year.

Rule 5.1-3 of Alberta's Code of Conduct also prohibits a lawyer from appearing before a judge when the lawyer's relationship with the judge would create an apprehension of bias. Former judges may not appear in court for two years or more, depending on whether there are other factors that cannot be mitigated by the passage of time. Both the Model Code and the Alberta Code prevent those in a business or personal relationship with a judge from appearing before that judge.

The Federation's proposal to prevent former judges from appearing in court presumes that the administration of justice and the public's faith in the court process is negatively impacted by the appearance of a former judge as counsel in court. Courts in other provinces have experienced scheduling difficulties, due to judges' discomfort in presiding over a matter in which a retired judge is counsel. There are unfortunate examples of a former judge being referred to as "His Honour" in court, and of former judges referring to their earlier status and decisions. These sorts of behaviours are "offside" but infrequent, and could reasonably be managed by the courts when they arise.

Opinions diverge on whether the ban on court appearances is a proportionate approach, with some favouring a cooling off period. Less restrictive rules mean that clients would have access to high quality legal representation from former judges. Many former judges make significant contributions after retirement, in a variety of ways. Some argue that post-retirement restrictions will discourage meritorious applicants and limit the pool of potential judges. There are also some cases in which judges resign from the bench after only a short tenure, making it difficult to justify applying a restrictive rule.

The independence of the judiciary provides the strongest principled reason for permitting former judges to appear in court. A blanket prohibition seems to assume that judges cannot be impartial with former colleagues. There is support for the principle that they have the inherent jurisdiction to determine who appears in court and how those individuals conduct themselves.

We will wait with interest to see how this debate is resolved, and look forward to the work of the CJC as it considers the ethical issues facing Canadian judges.

NANCY CARRUTHERS joined the Law Society of Alberta as a Practice Advisor in 2005 and is now the Manager of Policy and Ethics. Prior to joining the Law Society, she was a partner at Parlee McLaws LLP in Calgary, practising civil litigation and insurance defence.

CBA ALBERTA'S AGENDA FOR JUSTICE

With the 2019 Alberta provincial election, which took place on April 16, 2019, the CBA Alberta Branch took the opportunity to raise the profile of justice issues.

Prior to the election, CBA Alberta met with the Justice Minister, as well as opposition justice critics, to introduce them to the issues in the Agenda for Justice, and wrote to all political parties asking them questions about their party's positions on justice issues. New this year, CBA Alberta created an Elections for Justice document and also showcased lawyer candidates running in the election, regardless of their party, noting that at the close of the previous sitting, there were only four lawyers in the Legislature, and lawyers at the table bring value to the legslative process. CBA Alberta also created helpful Key Messages and Talking with Candidates documents for members to use, in order to help keep justice top of mind when meeting with local candidates.

Not only did the CBA Alberta Agenda for Justice & Advocacy Committee unveil their updated Agenda for Justice document, but a media conference was held at the Matrix Hotel in Edmonton featuring CBA Alberta President Frank Friesacher, where he addressed the need for the justice system to receive proper funding. He told the media conference that "less than one percent of the last provincial budget was spent on the justice system in Alberta and that's not enough. We also know that for every dollar spent on justice, taxpayers save six dollars elsewhere."

Frank said he understands issues related to the economy, health care, and education typically dominate electoral discussion, and told the media present: "The SNC-Lavalin story showed how important an issue such as the independence of the judicial system is to Canadians, and issues related to justice should be part of the discussion (leading up to the election on April 16)."

The CBA is happy to see some positive developments in Alberta over the last few years, for example, ensuring common-law couples have the same property rights as married couples; a legal aid agreement providing sustainable funding for the next few years; and the appointment of provincial court judges from diverse backgrounds; but more still needs to be done.

The media coverage for this news conference was substantial, with most major media outlets in Alberta covering the story. Articles and videos were posted online on CBC, Global Television, CTV, and many more. A special thank you to members of the Agenda for their efforts updating and expanding the Agenda for Justice backgrounders. We consider the endeavor a great success and thank our members for their continued support.

LAW DAY 2019

Law Day events across the province were held throughout March and April, once again exhibiting the justice system to Albertans with the popular mock trials, courthouse tours, and Dial-A-Lawyer events. This year, there were some special challenges organizing Law Day, with increaseed security at the courthouses and restrictions on participation by the government due to the limitations on advertising during a writ period, and in Edmonton the renovations to the courthouse also had an impact. Overall, Law Day was once again a great success.

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WILL SEARCH: JERI JEANETTE COLEMAN, late of Edmonton, formerly of Spruce Grove, died November 10, 2018. Please contact **The Estate House by Gorman & Koski LLP, Attn. Douglas G. Gorman, at 780-451-7557 ext. 225.**

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JUDICIAL **UPDATES**

COURT OF APPEAL

- **The Honourable Mr. Justice Kevin P. Feehan** has been appointed a judge of the Court of Appeal of Alberta in Edmonton, effective January 29, 2019.

COURT OF QUEEN'S BENCH

- **Tamara Friesen** has been appointed a judge of the Court of Queen's Bench of Alberta in Edmonton, effective January 29, 2019.
- **Master R.P. Wacowich, Q.C.** (Edmonton) retired as a half-time Master effective February 28, 2019.
- **Anna Loparco** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Edmonton, effective March 8, 2019.
- **D. Vaughan Hartigan** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Lethbridge, effective March 8, 2019.
- **The Honourable Susan E. Richardson** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Edmonton, effective April 17, 2019.

PROVINCIAL COURT OF ALBERTA

- **Kristen R. Ailsby** has been appointed as a Provincial Court Judge to the Southern Region/Lethbridge, effective February 19, 2019.
- **Gay L.M. Benns** has been appointed as a Provincial Court Judge to Calgary Family and Youth Division, effective February 19, 2019.
- **Susan E. Pepper** has been appointed as a Provincial Court Judge to Calgary Criminal/Calgary Regional, effective February 19, 2019.
- **Greg A. Rice** has been appointed as a Provincial Court Judge to the Edmonton Region/Vermilion, effective February 19, 2019.
- **Gregory D.M. Stirling** has been appointed as a Provincial Court Judge to Calgary Criminal/Calgary Regional, effective February 19, 2019.
- **Rhonda E. Tibbitt** has been appointed as a Provincial Court Judge to Edmonton Family and Youth Division, effective February 19, 2019.
- **The Honourable Judge James J. Ogle** (Calgary) has been appointed as a part-time judge, effective March 1, 2019.
- **The Honourable Judge Peter T. Johnston** (Vermilion) has been appointed as a supernumerary judge, effective March 22, 2019.
- **The Honourable Judge Robert J. Wilkins** (Calgary) retired as a part-time judge, effective March 25, 2019.

MIKE **MORRISON &** EMMA **STEVENS**

BY **JOSHUA SEALY-HARRINGTON**

For this edition of Law Matters, we are striving to explore the complex architecture of democratic processes that contribute to good governance. With that in mind, for our Unsung Hero column, I sat down with Mike Morrison and Emma Stevens — the Founder and Manager of Bloggity, respectively — to discuss the role that media plays in Canadian, and specifically Albertan, governance. Mike Morrison[1] is the author of Mike's Bloggity Blog[2] and the President of Bloggity, a modern media company that runs events for marketers and entrepreneurs across Canada. And Emma Stevens[3] is a public relations practitioner living and working in Calgary. As Manager at Bloggity, she leads events and content creation for the modern media company.

MIKE **MORRISON**
&
EMMA **STEVENS**

The **Unsung Hero** column is intended to introduce a member of our profession who has demonstrated extraordinary leadership, innovation, commitment, or made significant contributions to social justice and community affairs.

JSH: What does it mean to live in a city, a province, or a country, that has good governance?

MM: The line of good governance is constantly moving. Considering the SNC-Lavalin scandal, what Trudeau did isn't great, but then, five days later what Scheer did with the Yellow Vests isn't great either. It all depends on what the media decides gets attention. I'd like to think it means honesty, and setting a standard, but it always feels like it's moving these days.

ES: Drawing a little bit from my experience working in communications for government, it's really interesting what people think is good governance. Some people think good governance is doing what's right for a city, no matter what it costs; other people think good governance comes down to fiscal responsibility. And sometimes those two things don't jive.

JSH: What role does journalism — in the capacious sense — play in good governance?

MM: Social media has expanded the definition of journalism. Sometimes people call me a "journalist." Sometimes people call me a "wannabe journalist." But I'm neither! Please have a higher bar for journalism than *Mike's Bloggity Blog*. I think I'm following the rules of journalism, that everything I'm saying is factual and comes from a researched point of view. But everything I'm doing is opinionated, so it has the slant of my opinion. Now, opinion columnists get the cover of the newspaper, which is so weird to me. The cover should be breaking headlines, not someone's blog post. So what we consider good journalism is really changing. And now, more than ever, we are looking at the influence that owners of newspapers can have on their content. I don't know that we considered that 10-20 years ago — how the owner of a newspaper would influence a newspaper, or an election, in a way that benefits them.

ES: There isn't the same bar of trustworthiness that we use to have in journalism. We can't gauge the relative importance of everything in our newsfeed. One question is, "what is good journalism?" Another is, "how are people interpreting good journalism?" I'm not sure everyone can distinguish the front page of the *Herald* and what's in their news feed.

JSH: I agree. The advent of social media has brought pros and cons to journalism; it's expanded the sources we are able to draw information from, but has also inundated us with information that is harder to manage and vet. It's an interesting problem that social media platforms are struggling with now.

ES: I think an extension of that is the "echo chamber." We surround ourselves with content we like, and the algorithms exacerbate this. So, I may never be exposed to "good journalism"; I'm just exposed to content that aligns with my views. It's putting us in smaller circles and reinforcing our existing beliefs.

JSH: Is there a special role for relatively more informal sources of journalism (e.g., blogging, *Twitter*, *Instagram*) that is distinct from traditional journalism?

MM: For minorities — for a gay person like me — there's not a single LGBTQ person hosting a television show in Canada. So social media has been able to give different people different platforms that traditional media doesn't recognize. I was just looking at the *Global News* elections team profile and its literally

all white, straight people. They are going to be covering an election which implicates LGBTQ rights and race issues. Can they contribute to the conversation in the same way as if they had a black reporter, or a gay reporter? Nothing I've done has been on purpose. I didn't start a blog because I thought "finally my voice will be heard." But I've come to realize that I would not have had the same opportunities I've had if I had just waited for traditional media to hire a gay, bald, 5'5 guy. So informal media lets people create their own audience, and find their own voice.

ES: What's interesting, too, is the back-and-forth. What is important about social media — and your Twitter, Mike — is that, when you say something, someone can respond. It's different from a headline. The story can evolve in a way traditional media can't. People can participate.

JSH: But a lot of people are critical of social media in a similar vein, because, for example, *Twitter* character counts promote reductive dialogue. What do you think about that?

ES: That's so tough. I feel better after reading a *Globe and Mail* piece in full, than I do after reading a *Twitter* thread. I definitely trust it more.

MM: I think it's funny that we call it "long reads" now. Ten years ago that was just the length of any story. Now, a long read means "it's long, but it's worth it." Social media helps stories spread faster. I'm in Edmonton right now and there was a rally here yesterday for LGBTQ rights and that was organized in less than 24 hours and there was maybe over 1,000 people there. And if you had done that in print it wouldn't have been the same. Social media helps you realize that other people think the same way as you.

ES: Part of it, too, is who consumes what type of media. The people reading the *Herald* are a particular demographic. So in terms of reach and access, if a paper wants to make money, they have to keep their subscribers happy. And I don't think there are a lot of queer 16-year-olds getting their news from traditional news sources.

JSH: Is social media contributing to diminishing attention spans, and if so, is that impoverishing the depth and nuance of our conversations? Does that have implications for political discussion, and in turn, good governance?

MM: Absolutely. Someone can take my 140 characters to their dinner table without understanding what I said or interrogating whether what I said was accurate. In contrast, a newspaper has more vetting and nuance.

ES: A few years ago I started to think about: "What's the next front page?" We used to think of the front page as the be all end all; you want to be on the front page. And now the front page doesn't mean the same thing anymore. I think there is a need for a new front page; a new journalism with the accessibility of social media, and the integrity of more traditional outlets. Facebook is working on a project called the "Facebook Journalism Project" and it's an important one. After the 2016 election, I called my mom and said: "It's Facebook's fault." I knew there were Trump supporters, but I didn't know how many there were.

JSH: What do you see as the future of social media, and its role in political accountability and governance?

MM: I'm still surprised that politicians get taken out with a bad tweet. We've had some candidates here in Alberta, and they're not old tweets; some are from this year. I'm surprised people don't realize that what they say online can come back to haunt them.

JSH: The implication being that you think politicians will be more circumspect in what they say online?

MM: I think both sides are very smart. There are people screen-grabbing homophobic and racist things "just in case." And potential candidates are screened for social media history. So, it just depends on who gets there first. Both sides are trying to outsmart social media, but eventually we're going to have candidates stop saying things altogether, and then we won't know where they stand at all, which is not a great place to be. We had a candidate here in Calgary for whom four years of social media history was missing, and she was a prolific tweeter. We're left asking: "Where did that go?"

ES: What Alexandria Ocasio-Cortez is doing on social media, is maybe not absolute transparency, but its close. She stands by what she says in chambers and in the streets. She carries herself the way she wants to be portrayed. I love following her. She gives her supporters so much great content to share. And I would love to see more politicians investing in transparency. AOC talks about how she spends all day speaking with constituents, not donors. And that alone, I think, is a great talking point, which she can stand by through her social media.

JSH: I find it interesting that you two have, in the span of five minutes, presented very different visions for the future of social media and governance. Mike has raised concerns about people being silent for fear of being confronted with what they've said, and you've raised how, to be seen as transparent, politicians will need to be routinely engaging with constituents through social media. I think you're both right; I think both are going to happen.

MM: I think that's right. We don't know. If politicians are going to stop posting on *Facebook* and *Twitter*, the question then becomes, where are they going to post? And does that become a darker place that is even more of an echo chamber? Even for me, I'm very vocal. Sometimes people will screengrab me rather than retweeting me. But everything I say, I stand by. A few months ago I said something that was wrong, and the Reddit people who dislike me said: "Delete it! Delete it!" Instead, I replied to myself and added a correction and an apology. And when people asked why I didn't delete it I said, if I delete it, then you're going to criticize the deletion in a separate conversation. I'm trying to keep this to show the whole story.

JSH: Last question: What would you both recommend to Albertans who are considering greater participation in social media from the standpoint of politics and

Continued from p.21

governance?

ES: I would say *The Sprawl*. It's an independent journalism project. They're issues-based rather than deliverable-based, and that allows them to focus on content rather than needing to keep readers and advertisers happy 24/7. They're also great on social media. So I feel like *The Sprawl* is straddling that line between traditional and modern media really well. That said, I have to recognize my own bias, and *The Sprawl*, while it does produce non-biased content, is usually pretty progressive, and so am I.

MM: What Emma and I have been trying to do, with this Alberta election in particular, is to come up with ways that people can participate in social media, government, and elections that makes it feel safer. I don't talk about the bad stuff that people say to me or have tried to do to me because I don't want to scare people away. So, we have this thing called "Democracy Doughnuts," where we will feed people doughnuts if they vote early. We are using social media to promote early voting, and to make it fun and instagrammable. We also have #OneThingForAlberta. I support Rachel Notley, and so every day I tweet one thing that you can do that is free and easy to support her. And then we are doing #DragOutTheVote, to get all the area drag queens to vote together; Emma even called Elections Alberta to ask them something they've probably never been asked before: "Can drag queens vote?" And they can vote in drag! So, while we are trying to get issues to the table, we are also trying to empower people in the political process.

ES: Politics used to be something you don't talk about; you don't talk about sex, money, or politics. And I'm more of the mind that you should talk about those things. You don't need to talk about sex with everyone, but you should talk about it. And you don't need to talk about money with everyone, but we should be comfortable talking about money. And — most importantly — we should be comfortable talking about politics. And I think social media gives people a chance to talk about politics. It's a double-edged sword; people can be *behind the keyboard* and say whatever they want, but by that same token, they can be behind the keyboard and say *whatever they want,* and that can be a good thing for people who would be at risk otherwise.

[1]twitter.com/mikesbloggity
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Do you know an Unsung Hero? Tell us about them.
If you know a lawyer who deserves to be recognized, please send us an email to communications@cba-alberta.org with the lawyer's name and the reasons why you believe they are an "unsung hero". The only formal requirements for nomination are that our "unsung hero" be an Alberta Lawyer and a CBA member.

JOSHUA SEALY-HARRINGTON B.Sc., (UBC), J.D. (Calgary). Joshua is an LL.M. candidate at Columbia Law School, where he is a Fulbright Student and Law Society Viscount Bennett Scholar. He is a former Law Clerk at the Supreme Court of Canada and the Federal Court.

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