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LAW MATTERS

Canada's International Obligations

The Agreement Formerly Known as NAFTA

Implementing UNDRIP: Reflections on Bill C-262

Young Lawyers International Program

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITOR'S **NOTE**

BY **JOSHUA SEALY-HARRINGTON**

At *Law Matters* we always strive to keep our finger on the pulse of Canadian legal discourse. Our last edition[1] — published shortly after cannabis legalization — discussed the implications of legal cannabis for municipal regulation, immigration, workplace safety, and criminal law. Here, we discuss another pressing issue currently facing Canadians: Canada's international obligations.

Examples of the recent controversy surrounding Canada's international obligations — and, more broadly, of legal issues with international scope — are plentiful.

At home, the Global Compact has been a divisive legal and political issue. Some[2] raise concerns about its implications for Canadian sovereignty; others[3] argue that, as a non-binding agreement, the Compact raises no such concerns, and is nothing more than partisan pandering. For a thorough discussion, The Docket has a detailed interview[4] with Louise Arbour who personally worked on the Compact as Special Representative of the Secretary-General for International Migration. Similarly, the recent RCMP occupation of the Unist'ot'en Camp in northern British Columbia likewise stimulated discussion about Canada's commitment to international standards regarding Indigenous peoples.

International issues have also been at the forefront of Canadian legal media with respect to issues abroad. In December[5], Canadian officials arrested a top executive of Chinese tech giant Huawei for extradition to the United States in relation to fraud allegations. In seeming retaliation[6], China has detained multiple Canadians, and sentenced one to death. And of course, the ostensible assassination of Jamal Khashoggi[7] — a Washington Post reporter — drew international headlines across the globe. The international dimension of these issues expand their scope, complicate their analysis, and in turn, demand even greater attention and adversarial discussion.

In this edition, we take on various international issues. Michelle Hoffmann — who was part of the core legal team supporting CUSMA negotations — provides a helpful overview highlighting key components of the agreement, and explains why it is no Faustian bargian. Further, Professor Nigel Bankes discusses Bill C-626 and Canadian legislative efforts to implement UNDRIP (the United Nations Declaration on the Rights of Indigenous Peoples), and in turn, make greater efforts to "decolonize Canadian law and the Canadian legal mind." For additional analysis on implementing UNDRIP, see this helpful discussion[8] from former Executive Legal Officer to the Chief Justice of Canada, Gib Van Ert. Lastly, we include two accounts from international trailblazers who provide insights into how lawyers interested in the international arena can get involved. Amanda Bahadur — born and raised in Calgary, Alberta — discusses the Young Lawyers International Program which provides new calls the opportunities to work abroad promoting global development and the rule of law; in her case, YLIP brought her to Guyana, where she has been working tirelessly to promote LGBTQ+ rights. And Vincent Wong — a prestigious Human Rights Fellow at Columbia Law School — sat down with me to discuss his experience working with human rights, and how, whether at home or abroad, there are many worthy human rights initiatives for lawyers to get involved with.

In an increasingly globalized world, we can no longer remain blind to the increasingly interconnected world we live in. Many of the most heated debates of our generation — from climate change, to President Trump's border wall — are innately international. So join us in reflecting on Canada's international obligations, both at home and abroad.

[1] www.cba-alberta.org/Publications-Resources/CBA-Magazines/Law-Matters/Law-Matters-Fall-2018
[2] torontosun.com/opinion/columnists/lilley-un-global-compact-for-migration-is-bad-for-canadas-sovereignty-as-scheer-says
[3] nationalpost.com/news/canada/andrew-coyne-andrew-scheer-steers-hard-to-right-on-un-migrants-pact
[4] www.michaelspratt.com/poadcast-legal-matters/
[5] www.cbc.ca/news/canada/british-columbia/huawei-meng-extradition-questions-fraud-1.4943162
[6] www.washingtonpost.com/opinions/2019/01/16/how-china-is-using-death-sentence-manipulate-canada/?noredirect=on&utm_term=.4e1540fe5313
[7] www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html?noredirect=on&utm_term=.94e43ddd3dc8
[8] https://www.linkedin.com/pulse/impression-harmony-bill-c-262-implementation-undrip-canadian-van-ert

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PRESIDENT'S **REPORT**

BY **FRANK FRIESACHER**

"Winter Adé" is a popular German children's song. It means "goodbye winter," and is a celebration of the coming of spring. As I write this in January, with another cold snap in Edmonton, I expect that by the time it hits your desk in February, we will be moving towards warmer weather! Also by the time you read this, I will have been at Saskatchewan and Manitoba CBA branch mid-winter meetings, and hosted their respective presidents, along with the NWT president and our National President Ray Adlington, in Edmonton at the Alberta Branch AGM and Council meeting on 5 February.

That same day we honored four recipients of the 2019 Distinguished Service Awards, jointly awarded by CBA Alberta and the Law Society of Alberta. Please join me in congratulating Professor Tamara Buckwold (Legal Scholarship), Tracey D. Stock (Pro Bono Legal Service), John-Paul Boyd (Service to the Community) and Kevin Feth, QC (Service to the Profession).

I am over one-third of the way through my year as president, and it has been a whirlwind of activity. Among those doings is the honoured task of bringing greetings and best wishes on behalf of the CBA at the swearing-in ceremonies of our newly appointed Provincial Court or Queen's Bench judges and justices. Both nationally and provincially, turn-over as well as an emphasis on increasing the judicial complement have meant that these ceremonies have increased in number: I just spoke at my 16th such event since joining the executive, and my sixth in the past five months! Well attended by the Bench and the Bar, and of course by the family and friends of the honoree, it is a wonderful moment to recognize the Canadian judicial system and the rule of law that we should never take for granted, and an opportunity to tell a new audience what the CBA's role is in that process. While much work goes into customizing these greetings and gathering anecdotes and stories, it is a worthwhile endeavour.

One of those swearing-in ceremonies was in Grande Prairie, on 26 October 2018. Law Society of Alberta President Don Cranston, QC and I took the opportunity to hold a meet-and-greet event with local lawyers. We were able to report on our respective organizations' current activities, and the local bar shared their concerns. This was a great opportunity to engage with lawyers outside of Edmonton and Calgary, and I look forward to more such events.

For my brief tenure as president, in addition to the various day-to-day responsibilities that the position brings, our executive committee is focusing attention on three areas: (a) a transition of CBA Alberta governance and resulting engagement opportunities; (b) an updated Agenda for Justice in anticipation of the spring 2019 provincial election; and (c) developing greater membership communication and interaction opportunities.

My last report in the fall online Law Matters (**www.cba-alberta.org/Publications-Resources/CBA-Magazines/Law-Matters/Law-Matters-Fall-2018**) gave some details on the unfolding of our new CBA Alberta governance model. At the 5 February 2019 AGM, our members were asked to approve the new bylaws to give effect to the model approved by Council last year, to reflect on why this transition is important, and how to continue to build member engagement into everything we do.

Some of those engagement opportunities are immediately ahead of us. We are looking for a North Alberta CBA member to join us on the executive committee. Nominations for the Secretary position will open in March. Also opening up is the opportunity to be the director from Alberta on the CBA national executive, a 2-year term. Both seek candidates who are passionate about the CBA, and committed to building for our future in the best interests of our members and of our profession.

As we have reported throughout this year, the CBA Alberta Branch is focusing efforts on our Agenda for Justice, which outlines priority justice issues, in advance of the upcoming spring 2019 Alberta provincial election.

The original agenda was released by CBA Alberta prior to the 2015 election, and provided members with key messages on why justice matters, and talking points for discussing justice issues with election candidates. It has also proven a useful advocacy tool with the current government and with all stakeholders, outlining why we should be concerned, and why the CBA is involved.

The current priorities we have identified are as follows:

- Legal Aid
- Reforming the Family Justice System
- Drug Treatment Court
- Judicial Compensation
- Distribution of Property for Unmarried Couples
- Resources for the Justice System

Our Agenda for Justice committee has been working hard to update information to arm our members with great collateral to discuss with potential candidates. Look for more information soon on your opportunities to get involved during the campaign and make a difference!

Remember to stay tuned for the upcoming offerings in CBA Alberta's professional development here: **www.cba-alberta.org/Professional-Development-Resources**.

That's it, thanks, and all the best in 2019! We at the Canadian Bar Association strive to bring value to our members. I and the Executive Committee welcome your feedback, to help us make your organization the best it can be as we move forward into this year and into new and bold directions.

WHAT'S **HAPPENING**

FEBRUARY

20: The Canadian Bar Association presents: **NEGOTIATING THE DEAL: PRELIMINARY AGREEMENTS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSA319

21: The Canadian Bar Association presents: **APPELLATE ADVOCACY SECTION MEETING (REMOTE)** Vancouver Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=BC_APP0219R

21: The Canadian Bar Association presents: **WELLNESS AT YOUR DESK: HEALTH TIPS FOR BUSY LAWYERS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_NASOL719

27: The Canadian Bar Association presents: **BREAKING DEADLOCK: RE-OPENING HOPELESSLY BLOCKED NEGOTIATIONS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSP619

MARCH

1: The Canadian Bar Association presents: **CBA-FLSC ETHICS FORUM** Toronto, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_ETHICS19

1: The Canadian Bar Association presents: **YOUR FIRST CIVIL TRIAL** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19YLD0301X

5: The Canadian Bar Association presents: **NON-TRADITIONAL FRANCHISE RELATIONSHIPS – UNRAVELLING THE COMPLEXITIES** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19FRA0305X

7: The Canadian Bar Association presents: **FOUNDATIONS OF INDIGENOUS LAW** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19YLD0307X

26: The Canadian Bar Association presents: **BEYOND THE CONSTRUCTION ACT: OTHER LEGAL UPDATES FOR CONSTRUCTION LAWYERS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19CON0326X

26: The Canadian Bar Association presents: **TAX UPDATE FOR DOMESTIC AND CROSS-BORDER ESTATE PLANNING PRACTITIONERS** Toronto Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19TRU0326X

APRIL

3: The Canadian Bar Association presents: **FINANCING THE DEAL: SECURED LOAN TRANSACTIONS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSA519

6: The Canadian Bar Association presents: **CBA CRIMINAL JUSTICE CONFERENCE** Vancouver, BC. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_CRIM19

6: The Canadian Bar Association presents: **CBA HEALTH AND WELLNESS CONFERENCE** Ottawa, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_WELL19

9: The Canadian Bar Association presents: **AVOIDING COMMUNICATION BREAKDOWN WITH YOUR CLIENT** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSP419

11: The Canadian Bar Association presents: **PROFESSIONALISM ALERT: LSO PRACTICE MANAGEMENT REVIEWS, RETAINERS, CONFLICTS OF INTEREST, DELEGATION AND SUPERVISION** Toronto Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19IMM0411X

18: The Canadian Bar Association presents: **MANAGING PARTNER ROUNDTABLE: TRENDS IN OFFICE SPACE: FUTURE OF LAW FIRM** Toronto Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19LPM0418X

30: The Canadian Bar Association presents: **WAIVER OF SOLICITOR-CLIENT PRIVILEGE: TIPS AND TRAPS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSP719

MAY

2-3: The Canadian Bar Association presents: **CBA ENVIRONMENTAL, ENERGY AND RESOURCES LAW SUMMIT** Vancouver, BC. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_ENV19

6: The Canadian Bar Association presents: **CBA CHARITY LAW SYMPOSIUM** Toronto, ON. Live Webcast available outside GTA. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_CHAR19

7: The Canadian Bar Association presents: **CBA COMPETITION LAW SPRING CONFERENCE** Toronto, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SPCOMP19

8: The Canadian Bar Association presents: **MANAGING DEAL RISK: DRAFTING FINANCIAL TERMS** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSA719

13: The Canadian Bar Association presents: **MASTERING SUMMARY JUDGMENT** Toronto Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=ON_19LAB0513X

15: The Canadian Bar Association presents: **CLOSING THE DEAL: THE TRANSACTIONAL LAWYER'S TOOLKIT** Online. For more information, visit https://www.cbapd.org/details_en.aspx?id=NA_SLSA819

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

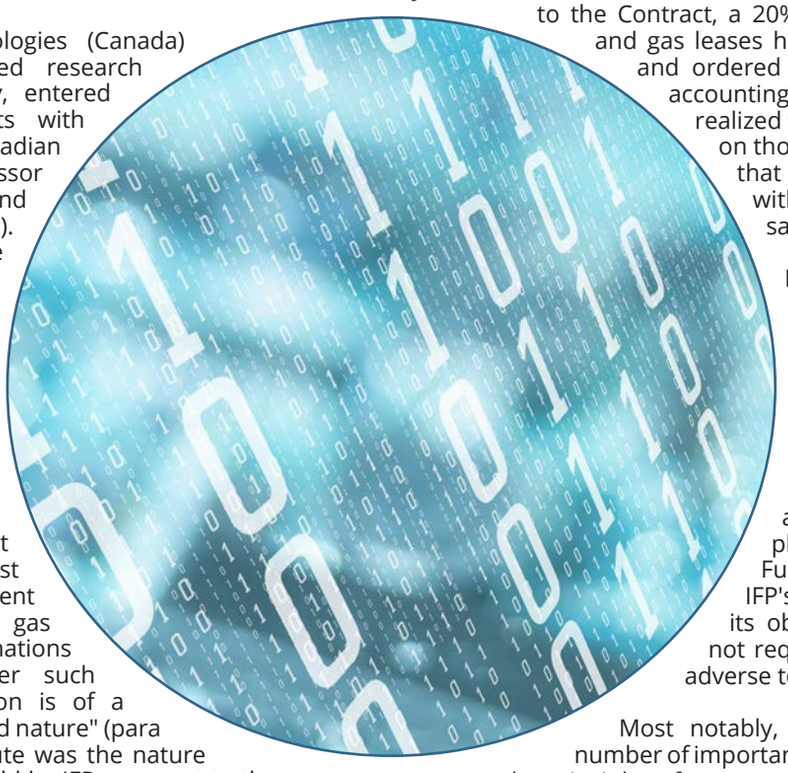
TRAPPED IN THE MATRIX: **THE CONTINUING LEGACY OF IFP TECHNOLOGIES V ENCANA**

BY **MICHAEL O'BRIEN**

2019 marks the second anniversary of the Alberta Court of Appeal's landmark decision in *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157. Since its release, the decision has had a profound impact on the principles of contractual interpretation in Alberta. The decision has been considered in over 60 reported decisions, including in jurisdictions beyond Alberta. As a result of the decision, expressions such as the "factual matrix" and "terms of art" have become part of the litigator's lexicon. As we approach the decision's second anniversary, it provides a good opportunity to reflect on the key principles arising from the decision and their enduring legacy.

Background

The appellant, IFP Technologies (Canada) Inc ("IFP"), a French-owned research and development company, entered into a series of contracts with the respondent, Pan Canadian Resources, a predecessor to Encana Midstream and Marketing (collectively, "PCR"). IFP and PCR entered into the arrangement in order to jointly pursue an enhanced recovery technology project at PCR's project at Eyehill Creek. The parties executed 4 written contracts to affect the arrangement (collectively, the "Contract").



Under the Contract, PCR conveyed to IFP the right to "a 20% working interest related to the development and production of oil and gas resources within all formations of [Eyehill Creek], whether such development and production is of a primary, assisted or enhanced nature" (para 22). A key issue in the dispute was the nature and extent of the interest held by IFP pursuant to the Contract. PCR insisted that IFP's interest in Eyehill Creek was limited to an undivided 20% interest in oil and gas produced through assisted recovery methods, while IFP claimed that its interest referred to all the oil and gas recovered, regardless of the method by which it was extracted.

The matter was initially heard over the course of a six-week trial. The Court of Queen's Bench trial judge who oversaw the trial proceedings died before a decision was rendered. The parties agreed not to hold a new trial, but rather elected to have another judge of the Court of Queen's Bench decide the matter based on the written trial record (the "Trial Judge"). The Trial Judge ruled in favour of the respondents on the basis that, among other things, the term "working interest" was not defined in IFP's contract with PCR, and that "working interests" was referenced only in relation to certain thermal and enhanced recovery methods.

IFP appealed on the claimed basis that the Trial Judge made a number of errors of law. Critically, IFP maintained that the term "working interest" was a legal term of art, which had a specific meaning in the context of the Canadian oil and gas industry. The Court of Appeal noted that the Trial Judge's decision predated two groundbreaking decisions of the Supreme Court on contractual interpretation: Sattva Capital Corp v Creston Moly Corp and Bhasin v Hrynew.

Decision

The Court of Appeal reversed the trial decision, finding in favour of IFP. In her majority reasons for judgment, Chief Justice Fraser concluded that IFP had conveyed, pursuant to the Contract, a 20% working interest in all oil and gas leases held by PCR at Eyehill Creek and ordered that IFP be entitled to an accounting for 20% of the net revenue realized through primary production on those lands. Further, she found that IFP had acted reasonably in withholding its consent to the sale.

In respect of IFP's withholding of consent, the Chief Justice concluded that it was reasonable for IFP to do so as the proposed disposition by PCR would have resulted in a significant increase in conventional production and been detrimental to IFP's plans for thermal production. Further, she concluded that IFP's obligation to perform its obligations in good faith did not require IFP to act in a manner adverse to its legitimate interests.

Most notably, the Chief Justice made a number of important statements with respect to the principles of contractual interpretation, including:

1) Factual Matrix: A trial judge must consider the surrounding circumstances or "factual matrix" of a contract, regardless of whether the contract is ambiguous. It is an error of law for a trial judge to discount or disregard evidence of the factual matrix on the basis that a contract is not ambiguous. The Court will review such an error on the correctness standard.

2) Parol Evidence Rule: A consideration of the factual matrix does not offend the parol evidence rule because evidence of surrounding circumstances is used only as an objective interpretative aid to determine the meaning of the words of the parties, rather than to vary or replace their meaning.

3) Terms of Art: A legal term of art that has a common meaning to participants in a given industry need not necessarily be defined in a contract. If the term has an accepted meaning and

Continued from p.5

usage in a sector, its interpretation by the court has precedential value and it must be interpreted consistently. In that respect, a term of art is analogous to a standard form contract. For a trial judge to misinterpret a term of art is an error of law, which the Court will review on the correctness standard. Likewise, it is an error of law reviewable for correctness for a trial judge to disregard a legal term of art or to fail to recognize that a legal term of art has a certain meaning.

4) Practical, Common Sense Approach: In discussing the practice of contractual interpretation, the Chief Justice strongly promoted a practical, common-sense approach to determine what the parties to a contract intended. In doing so, she encouraged courts to determine the objective intentions of the parties in a manner that accords with commercial principles and good business sense. The Chief Justice cautioned that failing to do so would encourage parties to take their disputes out of the courts and into the private sector for resolution, which would ultimately be hurtful to the evolution of the common law.

The Enduring Legacy of the Factual Matrix

Leave to appeal to the Supreme Court was denied in 2018, making the Court of Appeal's decision the "last word" when it comes to this case. In addition to the legal principles discussed above, the Court of Appeal recognized that business "craves certainty", is "understandably risk adverse" and so ensuring the proper interpretation of contractual obligations is essential to the economic well-being of the country, especially in Alberta's oil and gas sector where investments are often measured in millions, if not billions, of dollars. If anything, the decision has served as a clarion call for a more commercially reasonable approach to contractual interpretation.

"Matrix" art: iStock-882141812

MICHAEL O'BRIEN is a partner in the Litigation group at Blake, Cassels & Graydon LLP. His practice involves complex, high-profile corporate/commercial litigation and domestic arbitration. In addition, Michael is an instructor at the University of Calgary Law School and is a frequent speaker on new litigation developments.

CANADA'S **INTERNATIONAL OBLIGATIONS**

THE AGREEMENT **FORMERLY KNOWN AS NAFTA**

BY **MICHELLE HOFFMANN**

On November 30, 2018 the leaders of Canada, Mexico and the United States signed the trade agreement that will replace the North American Free Trade Agreement (NAFTA) once ratified by all three states. What that agreement is called depends on who is speaking – in treaty law, it's customary to list your own country first. In Canada, the Agreement is known as the CUSMA (and in French, "l'ACÉUM"), whereas in the US it's the USMCA, and in Mexico the (catchiest, in my opinion) "T-MEC". The titles our respective political masters decided on were a surprise for most negotiators until the text went public on September 30th, 2018, and many continue to refer to it as simply "NAFTA 2.0", as it was known for the year and half that the negotiators took it apart and put it back together.

With CUSMA, Canada has committed to change its legal regime in several ways. For example, in the Intellectual Property chapter, we agreed to extend our term of copyright protection in domestic law from "life + 50 years" to "life + 70 years" for copyrighted works, and up to 75 years for performances and sound recordings, benefiting creators for a longer period of time. Or, in the Broadcasting Annex of the Cross-Border Trade in Services chapter, Canada agreed to rescind a decision on simultaneous substitution of broadcast signals that the CRTC had adopted in 2015, and that had been upheld as lawful by our domestic courts (bottom line: when the Agreement comes into force, you will no longer see American Super Bowl ads when viewing the game on signals that are retransmitted in Canada).

If either the US or Mexico believes that Canada is not living up to its treaty commitments, they can bring a State-to-State dispute settlement claim (jointly or individually) under Chapter 31, seeking removal of the offending measure. If an independent and impartial arbitral tribunal finds that Canada is in violation of the agreement, either Canada can lift the measure or the complaining Party can retaliate with trade measures of equivalent effect.

Contrary to what the critics may say, Canada signing on to this treaty is no Faustian bargain. Canada has committed to comply with the terms of the Agreement under international law, and the United States and Mexico have committed to do the same. Canada's commitment to the international legal order is perhaps most evident in the Trade Remedies chapter (Chapter 19 under the NAFTA, or Chapter 10 of the CUSMA). Throughout the negotiations, it was a redline for Canada to preserve Trade Remedies, which ensures that if one country flouts its anti-dumping and countervailing duty commitments under the Agreement, another Party can bring a challenge before a specialized binational review panel with experts from both countries, rather than resorting to the domestic courts of the challenged Party.

In the Investment chapter, Canada has committed — for a time — to allow claims against it by Mexican and American investors. Under the controversial Chapter 11 investor-State dispute settlement (ISDS) system in the original NAFTA, Canada could be subject to claims by foreign investors for changes to domestic measures that related to those investors and their investments in Canada. In the CUSMA, Canada has agreed to an additional 3-year period after entry into force, in which an investor with a "legacy investment" may bring a claim for a breach of the investment obligations under the NAFTA — after which Canada's consent to arbitrate is no longer valid. Canada has not agreed to arbitrate any investment claims under the substantive provisions of the CUSMA.

Perhaps more interesting than examining Canada's international legal obligations under the CUSMA is an examination of the ways in which governments tailor their treaty obligations to give themselves policy space. Another broader approach is to set out ways that they can do something that would otherwise arguably violate the Agreement in order to take a measure important for the public interest, particularly with respect to health, safety and national security. There are various means through which this is done, and the Exceptions & General Provisions chapter contains some specific broad and flexible provisions:

- National Security: This provision gives broad flexibility to a Party to take measures that it considers necessary for national security. The CUSMA version of this is broader than many Canadian agreements (but in line with some, such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)) — notably, it is broader than a similar provision at the World Trade Organization, where Canada (and many other countries) are challenging US action supposedly taken on this basis when they imposed tariffs on steel and aluminum;

- Taxation: Preserves flexibility for domestic tax authorities to develop future tax policies, as well as to maintain their existing regimes;

- Indigenous Peoples' Rights: A first for any trade agreement, and a key element of the current government's "inclusive trade agenda", this exception confirms that Canada's legal obligations under this Agreement will not impact its ability to adopt or maintain measures to fulfil its legal obligations to Indigenous Peoples — an interesting

CANADA'S INTERNATIONAL OBLIGATIONS

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legal question is the extent to which this simply confirms what other flexibilities in the treaty would already provide;

• Cultural Industries: A critically important exception for Canada (and Canadian content-creators), allowing Canada to take measures to protect Canadian artistic expression. Canada fought for this exception in the Canada-US Free Trade Agreement in the late 1980s, maintained it in the NAFTA, and was willing to walk away if it was not preserved in CUSMA as well. Notably, however, unlike the other exceptions, if a country relies on this exception the other Party can immediately "retaliate" proportionately, without having to go to a panel first.

It's impossible to summarize all the developments, omissions and oversights in a short piece. The details will emerge over the next several years as the particular provisions are elaborated on (including potentially through statements by governments), explored in more detail, and perhaps challenged before international tribunals.

Many commentators have criticized the fact that CUSMA largely replicates NAFTA. This is true. What the pundits don't know is what an accomplishment this is. For the first time in our trade negotiating history, Canada's negotiators were fighting not just to advance contemporary policy objectives, but also to preserve the fundamental elements of free trade that have shaped the North American economy for over two decades. Around the world, states are either moving towards increased multilateralism and trade diversification (such as those states that recently ratified the CPTPP), or calling for increased protectionism. With a crisis potentially looming in the international trading system, preserving the status quo with two of our biggest trading partners does not seem like much of a concession at all.

"NAFTA" art: iStock-518729077

MICHELLE HOFFMANN is counsel with the Trade Law Bureau of the Government of Canada, and was part of the core legal team supporting CUSMA negotiations. Opinions contained herein belong to the author, and do not necessarily reflect those of the Government of Canada.

IMPLEMENTING UNDRIP: **REFLECTIONS ON BILL C-262**

BY **NIGEL BANKES**

Bill C-262, an Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, was adopted by the House of Commons on May 30, 2018. It is currently in the Senate awaiting further debate on second reading. The Bill is a private member's bill introduced by NDP MP Romeo Saganash, but in November 2017 the government indicated that it would support adoption of the Bill.

The Bill comprises a nine paragraph preamble, six operative sections (including one section which provides the short title of the Act) and a Schedule which includes the Declaration. I think that the Bill strikes a judicious balance by affording the Declaration some immediate "application" in the laws of Canada, but also creates a process that will, over time, give greater effect to the Declaration within the Canadian legal system - and in doing so, slowly decolonize Canadian law and the Canadian legal mind.

My comments here focus on four sections of the Bill: section 3 which deals with the legal effect of the Declaration and sections 4 through 6 which are process and future oriented.

Section 3 is a declaratory statement as to the legal effect of the Declaration. It proclaims that the Declaration is "hereby affirmed as a universal international human rights instrument with application in Canadian law." This formulation gives rise to two questions. First, does the language "of application in Canadian law" serve to incorporate the Declaration into Canadian law? And second, if the answer to the first question is negative what other legal effect might it have?

As to the first question, my conclusion is that the language "of application in Canadian law" cannot in and of itself transform the Declaration into Canadian law or incorporate it into domestic law. I have three reasons for that conclusion. First, and as the Supreme Court of Canada has recently reaffirmed in the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 51: "Incorporation by reference requires clear language." Second, Parliament must be taken to be cognizant of the range of terms that have been used in other federal statutes when the goal is to give the force of law to something like an international agreement. Those other terms are much more explicit as to the intended legal effect than the words "of application in Canadian law". Third, read as a whole, including the preamble and the process-oriented provisions that follow section 3, the intent of the Bill is to establish the Declaration as a standard against which to measure Canadian laws and to bring those laws into conformity with the Declaration over a period of time. It is not the intent of the Bill to make the Declaration law as of the date that the bill itself attains the force of law. Another way to put this point is that if section 3 is read as making the Declaration immediately a part of Canadian law, there would be little need for the conformity analysis (section 4) and the action plan (section 5).

But if the language "of application in Canadian law" does not serve to incorporate the Declaration into Canadian law, what is the legal effect of this language? I think that the best way to answer this question is to first ask what use Canadian courts and tribunals have made of the Declaration up to this point in time. We can then ask how the "of application" language might change or clarify matters.

The Declaration has been referred to in over 50 court cases and about 15 tribunal decisions in Canada. The cases have dealt with a wide variety of issues including adoption, self-government, control of funds, duty to consult, education, medical treatment and discrimination. I think that we can discern two lines of authority in the cases with respect to the use of the Declaration as a relevant normative instrument to be taken into account when interpreting Canadian laws or constitutional doctrine.

On the one hand, there is a line of cases that emphasizes that the Declaration is merely a declaration and not a treaty, and that while Canada might have endorsed the Declaration, in doing so it declared that it was aspirational and not customary law and therefore not something that a court should rely upon. Perhaps the clearest example of this approach is Justice Hinkson's 2014 decision in *Snuneymuxw First Nation v. Board of Education – School District #68*, 2014 BCSC 1173. On the other hand, there is another line of cases which has already embraced the Declaration. Justice MacTavish's early decision in Canada (Human Rights Commission) v. Canada (Attorney General), 2012 FC 445 demonstrates the potential warmth of this embrace. In that case Justice MacTavish concluded that it was possible to look at the Declaration for three purposes: (1) to prefer an interpretation of a statute (in that case, the *Canadian Human Rights Act*) that is more consistent with Canada's international obligations, (2) to inform the contextual approach to statutory interpretation, and (3) to identify values and principles that should inform the interpretation of the legislation.

In sum, it might be said that a consensus has yet to emerge from the case law as to the normative weight that should be accorded to the Declaration. And with this conclusion as background we can now ask again what might be the legal implications of the term "of application in Canadian law"?

I think that if section 3 is enacted, it will be impossible for a Court or tribunal to take the nihilistic approach of Justice Hinkson and deny outright the normative relevance of the Declaration. Making the Declaration "of application" will allow, and indeed require, a court to use the Declaration for all of the purposes referenced by Justice MacTavish and with respect to both statutes and regulations and constitutional doctrine. Furthermore, since the section references the Declaration as a whole, I do not think that it should be necessary for a Court to inquire as to whether a particular provision of the Declaration represents customary international law. In choosing this language, parliament must be taken to have endorsed the domestic relevance or applicability of the entire text of the Declaration, whatever its status in international law.

We can now turn to sections 4 through 6. As noted above, these

CANADA'S INTERNATIONAL OBLIGATIONS

Continued from p.9

sections are much more process oriented and future oriented than is section 3. Both sections 4 and 5 demand that the Government of Canada act "in consultation and cooperation with indigenous peoples". Section 4 instructs the Government of Canada that "it must", in consultation and cooperation with indigenous peoples "take all measures necessary to ensure that the laws of Canada are consistent with" the Declaration. This obligation applies to both existing laws and regulations, but it must also apply to proposed new laws and regulations. It is effectively an instruction to decolonize Canada's laws and regulations at the federal level. This will be a major undertaking and considerable thought will need to be given to structuring an appropriate process that does in fact involve "consultation and cooperation" with Indigenous Peoples. What might this look like? Could it perhaps be structured in the form of a law reform commission with commissioners drawn from different backgrounds and with different representational responsibilities (and a multi-year mandate to carry out its task)? Evidently, decisions as to the appropriate structure will themselves require "consultation and cooperation" and indeed co-development as some witnesses put it in testimony to the House Standing Committee during its consideration of Bill C-262.

Section 5 instructs the Government of Canada, again in consultation and cooperation with Indigenous Peoples, to develop and implement a national action plan "to achieve the objectives" of the Declaration. This too will require considerable effort and allocation of resources. Unlike the consistency analysis required by section 4, section 5 is not concerned with the laws of Canada. Instead, it is concerned more generally to ensure that the objectives of the Declaration are being attained. There will be room for debate as to how to elicit the objectives of the Declaration.

Finally, section 6 requires the Minister to submit a report to the House and the Senate on the implementation of the government's obligations under sections 4 and 5 for each of the next 20 years, specifically the "measures" referred to in section 4 and the action plan referred to in section 5. This is evidently a transparency and accountability measure since tabling in both Houses provides the opportunity for questions and debate.

The emphasis on procedure in sections 4 and 5 and the accountability mechanism referenced in section 6 begs the question as to whether or not the obligations assumed by the Government of Canada and by the Minister in these sections are justiciable. To be clear, I think that section 3 is justiciable and that courts will have to decide what the words "with application in Canadian law" mean. This will inevitably also lead the courts to interpret different provisions of the Declaration. But sections 4 and 5 combined with section 6 stand on a different footing and in my view, at least some of the elements of those sections are likely not justiciable: see *Friends of the Earth v Canada*, 2008 FC 1183.

In sum, sections 4, 5 and 6 offer the promise of systemic and systematic change. Whether that promise will be realized will depend very much on how the two processes (the consistency analysis and the action plan) develop and the extent to which the necessary resources are made available for implementation. Properly resourced, these processes should make a significant contribution to the actions necessary to achieve reconciliation.

This comment is an abridged version of a blog posted on ABlawg on November 27, 2018 <http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf> .

NIGEL BANKES is a professor and holder of the chair in natural resources law at the University of Calgary. He is a frequent contributor to ABLawg: https://ablawg.ca/

ENGLISH STATUTES **IN FORCE IN ALBERTA**

BY **SANDRA PETERSSON**

Statute of Elizabeth 1571
Statute of Frauds 1677
Distress for Rent Act 1689
Statute of Anne 1709
Real Property Amendment Act 1845

These are among the more common examples of English statutes that are still applied in Alberta today. They are also among the more recent examples as the body of English statutes received in Alberta contains some examples that are more than 700 years old.

There are many reasons why Alberta ended up with English statutes such as the *Hudson's Bay Charter*, the *North-West Territories Act*, the *Alberta Act*, as well as historical (and questioned) concepts of colonization and settlement. The reasons are well-documented elsewhere. (See JE Côté, "The Introduction of English Law into Alberta" (1964) 3 Alberta Law Review 262.)

Fortunately, Her Majesty's (i.e. Queen Victoria's) Stationery Office had prepared a comprehensive list of the statutes believed to be in force in England in early 1870. This greatly simplified the starting point for determining what statutes may have been received in Alberta on July 15, 1870 – the formal date set for reception of English statutory and common law.

Nearly 150 years later, it is easier than ever to locate the text of received English statutes. Google and Wikipedia can do in seconds what would have taken nineteenth and twentieth century lawyers hours or possibly days to do if the text was even available locally. However, while the text is easily accessed, the substance of the law is not. On one hand, there are language barriers as the following extract from the *Statute of Frauds* illustrates:

All Leases Estates Interests of Freehold or Termes of yeares or any uncertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery and Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents thereunto lawfully authorized by Writeing, shall have the force and effect of Leases or Estates at Will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect.

On the other hand, it is increasingly harder to trace which statutes, parts of statutes, or even parts of sections might still be applicable and in force in Alberta today. These problems are exacerbated as English statutes are most likely to still apply in areas of private civil law as with fraud, fraudulent conveyances, and landlord and tenant.

It would be nice if the English statute would simply cease to have relevance with the passage of time. And some have. But Alberta court decisions from 2018 show that a variety of them are still applicable and applied.

ALRI is looking to prepare a list of English statutes potentially in force in Alberta. As the first part of that work, we would like to highlight the English statutes that are in regular use. We would appreciate hearing from you about which English statutes still come up in your area of practice. You can let us know by answering our one question survey available at bit.ly/OldLawAB. Having a shorter list of what is known to be in force and regularly applied is likely to be more useful than a long list of everything that might be in force. Identifying what's on that longer list will be the focus of a later part of our work.

SANDRA PETERSSON is the Executive Director of the Alberta Law Reform Institute. She joined ALRI in 2002, having previously held the positions of Counsel and Research Manager. Prior to ALRI, Sandra clerked for the Supreme Court of Canada and worked as Executive Legal Counsel to the Chief Justice of Alberta.

ETHICAL QUERIES AND QUANDARIES: **ISSUES COMMONLY RAISED WITH PRACTICE ADVISORS**

BY **ELIZABETH ASPINALL & NANCY CARRUTHERS**

Practice Advisors receive close to 5,000 phone calls and emails per year. The issues on which lawyers seek our assistance certainly vary (we see everything from dealing with difficult opposing counsel to dealing with difficult clients – with "difficult" taking on a vast definition). Unsurprisingly, we see many of the same issues arising across the full spectrum of practice areas. We thought this was a good opportunity to raise some of the issues we see and address. Here are our top ten:

1. We are frequently asked to navigate and even mediate disputes between lawyers, and we are happy to do so. Our assistance is less effective, and possibly even counterproductive, when one lawyer misquotes us to the other.

2. Lawyers on both sides of a dispute between counsel can fail to appreciate their own roles and ethical obligations (including civility). Lawyers should not see all opposing lawyers as the enemy. Doing so guarantees that you will neither enjoy practice, nor serve your clients in the most effective way possible. One of the best antidotes when the relationship with opposing counsel has soured is to try to establish a better connection with that lawyer. We know one lawyer who takes the other out for coffee when the file starts heading down the path towards antagonism. That is one of many effective strategies for managing the relationship.

3. Lawyers cannot withdraw simply because the client does not accept their recommendation, nor can lawyers unilaterally make the decision to withdraw, no matter how difficult the relationship may be. While the client's loss of confidence in the lawyer can terminate the retainer, ethical practice requires at least a conversation with the client so that the withdrawal occurs so as to minimize potential prejudice to the client.

4. Lawyers do not instruct clients: lawyers make recommendations and clients instruct lawyers.

5. While email is a fundamental form of communication, using it without being mindful of ethical practice can result in problems. The rules of confidentiality and privilege still apply. Lawyers should not copy their client on a message to opposing counsel, and should not get mad when the recipient replies all. Conversely, when the opposing lawyer copies their own client on an email, the receiving lawyer should not reply all. That is communicating directly with the opposing party.

6. Treat email like you would any professional communication. Avoid "snapping back" a response. Draft a considered and professional reply. If you are feeling angry or emotional while drafting that reply, wait a while before you hit send and consider redrafting when you are feeling calmer. Also avoid using all caps – it is akin to shouting. Treat every communication as if it will be exhibited in an affidavit. Do you really want the court reading that email where you look emotionally engaged and unreasonable?

7. Conflicts of interest are an unavoidable part of practice: they happen. When a conflict arises, assess whether it truly (honestly and truly) is in the client's interest for you to stay on the file. It is the rare file when another lawyer cannot represent your client. Honestly assess when a conflict may disqualify you from acting and let go so that you avoid distracting from the client's ability to advance the file. Your own interests are engaged, as well. If there is a conflict, you may not be able to bill that time, and could have spent it more effectively working on a file that you can bill.

8. File transfers are frequently emotional and antagonistic. Lawyers should avoid being the vehicle by which a client tries to avoid paying previous counsel. A client who can pay their former lawyer's account should do so and proceed to taxation if they have concerns, rather than asserting prejudice as a means of avoiding paying.

9. Lawyers should not blindly do what their clients tell them to do. If you think your client is up to something, you have a positive obligation to ask questions and, if appropriate, withdraw. Do not allow yourself to be the vehicle by which your client seeks to achieve a nefarious end.

10. Lawyers will often say that their obligation of zealous advocacy justifies their overly aggressive conduct on a file. In fact, the Code of Conduct states that lawyers should "resolutely" advance their clients' interests. Be firm and be strong but remain objective and reasonable to advance your clients' interests effectively.

The Practice Advisors appreciate that many situations appear more gray than these 10 examples suggest. We are happy to speak to you and help you work through ethical and practice issues.

ELIZABETH ASPINALL is a Practice Advisor and the Equity Ombudsperson at the Law Society of Alberta. Prior to joining the Law Society, she practiced at JSS Barristers in Calgary. Elizabeth is a member of the CBA Alberta Editorial and Equality, Diversity & Inclusion Committees.

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 NATIONAL BOARD NOMINATIONS

With the completion of the term of Nabeel Peermohamed on the CBA National board of directors on August 31, Alberta will be recruiting a new director to bring the voice of Alberta members to the national leadership of the CBA. Applications will be open from March 4, 2019 to April 1, 2019. Watch your CBA inbox for more information or visit: **cba.org/elections** after March 4 for further information on eligibility and the election process. This is your opportunity to share your experience, skills and vision to shape the legal profession and your professional organization. Consider applying today.

CBA ALBERTA 2019-20 SECRETARY NOMINATIONS

Beginning in March, we will be accepting nominations for the position of Branch Secretary for the 2019-20 membership year. Once elected, the Secretary progresses each year to become, in turn, Treasurer, Vice President, President and Past President. Candidates must be active members of the CBA Alberta Branch, and either be a current member of Council, or have been a member of Council at any time during the past four years. In this year's election, the candidate must reside in **North Alberta**.

Members will receive more information on the nomination process via email on March 1, 2019. Please contact Holly Schlaht at 403-218-4311 if you have any questions about the nomination process.

NEW IMMIGRATION HUB A ONE-STOP RESOURCE SHOP

Immigrating to Canada? That's the question asked by CBA.org's new immigration hub, which takes all of the plain-language resources created by the CBA Immigration Law Section and brings them together in one spot. The website is aimed at potential immigrants, but also serves as a resource for lawyers to offer to clients seeking to make a new home in this country.

Visitors to this website can find quick references, including Legal Health Checks; guides such as the Asylum-Seekers Toolkit and the guide to CETA mobility provisions; and videos addressing questions such as cross-border business and spousal sponsorship, which are available with closed-captioning in French, Spanish, Punjabi, Chinese and Tagalog. Visit **cba.org/For-The-Public/Immigrating-to-Canada** and **cba.org/Sections/Immigration-Law** for more information.

LAW DAY 2019

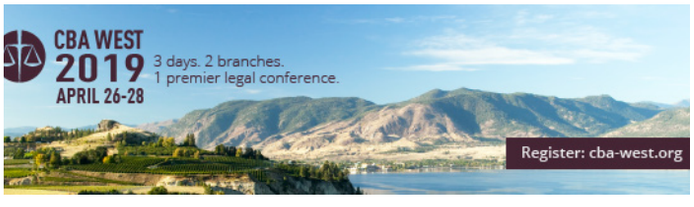
Law Day provides a great opportunity for the public to learn about the law, the legal profession and the legal institutions that form the cornerstones of Canadian democracy. Law Day activities in Alberta include mock trials, courthouse tours, citizenship courts, exhibits, as well as public speaking and mock trial contests aimed at junior and senior high school students.

Calgary, Edmonton & Red Deer: April 13, 2019.
Medicine Hat: April 6, 2019.
St. Paul: March 29, 2019.

If you are a CBA member interested in volunteering to assist our Law Day committees on Law Day, please contact Stefanie Baruffa at 403-218-4310 for more information. Visit **www.lawdayalberta.com** for more information on Law Day in your community.

CBA WEST 2019

Join colleagues from the CBA Alberta and BC Branches in beautiful Penticton, BC, on April 26-28 for three days of professional development, networking, and the famous BC hospitality! Register now for the CBA West 2019 conference and save up to 20% with Advanced Registration Pricing until Thursday, February 28! Visit **www.cba-west.org** for registration details and information on flight savings from Air Canada and WestJet.



2018-19 MEMBERSHIP RENEWAL

Your 2018-19 CBA National membership renewal was due on August 31. If you have not already done so, you can renew your membership online at **www.cba.org/Membership/Join-Renew.** Membership fees are now prorated until the end of August 2019. Please note that CBA Alberta Section memberships are contingent upon your CBA National membership dues being paid, and should you not renew your national membership, your Section registrations will be terminated.

Still available to CBA members are the Portfolio and Portfolio Plus enhancements to your membership. These packages provide members with CBA education credits, which can be used towards Section registrations, CBA professional development opportunities, conferences and more. Portfolio and Portfolio Plus packages also offer members up to three free materials-level Section memberships with the CBA Alberta and rebate rewards on approved CBA purchases (which will be

taken off future years' membership fees). More information on these packages is available at **www.cba.org/Membership/Membership-Information/Branch-Offerings/Alberta**.

2018-19 SECTION REGISTRATION

Section registration is still open for all CBA Alberta members. With recent changes made by the Law Society of Alberta to the CPD Program, it is more important than ever to participate in professional development delivered by your Section of choice.

This year, we have expanded our webcast offerings to include 38 Sections in Calgary and Edmonton. We have also opened up webcasting to make it available to those members who practice in Calgary and Edmonton, so whether you practice outside of the downtown core, or have trouble leaving your office for an hour at lunch, you can now participate in your Sections of choice remotely. Please note that webcast members who wish to drop in and attend a meeting in-person will be required to pay a drop-in fee.

Not getting your section notices? Effective October 31, the grace period for Section registrations has ended. This means that any member who has not renewed their 2018-19 Section memberships will no longer receive Section communications or notices, and will be required to pay a $25 drop-in fee should they wish to attend any meeting.

If you have not already done so, you can still complete your Section registration online at **www.cba-alberta.org/Section-Reg.** If you have any questions about your Section registration, please contact Linda Chapman (South) at 403-263-3707 or **sections@cba-alberta.org,** or Heather Walsh (North) at 780-428-1230 or **edmonton@cba-alberta.org**.

JUDICIAL **UPDATES**

COURT OF APPEAL

The Honourable Madam Justice Elizabeth A. Hughes (Calgary) has been appointed a judge of the Court of Appeal of Alberta, effective November 1, 2018.

The Honourable Madam Justice Dawn Pentelechuk (Edmonton) has been appointed a judge of the Court of Appeal of Alberta, effective November 1, 2018.

The Honourable Mr. Justice R.L. Berger (Edmonton) has retired effective October 26, 2018.

PROVINCIAL COURT OF ALBERTA

Honourable Judge Gerard M. Meagher (Calgary) has been appointed as a supernumerary judge, effective February 1, 2019.

Honourable Judge Eric W. Peterson (Lethbridge) has been appointed as a part-time judge, effective January 5, 2019.

Honourable Judge Peter B. Barley (Calgary) has been appointed as a part-time judge, effective January 1, 2019.

Honourable Judge Lynn T.L. Cook Stanhope (Calgary) has been appointed as a supernumerary judge, effective December 6, 2018.

Honourable Judge Marilyn M. White (Leduc) has been appointed as a supernumerary judge, effective November 27, 2018.

Honourable Judge Harry A. Bridges (Edmonton) has been appointed as a supernumerary judge, effective November 22, 2018.

Michelle C. Christopher, Q.C. has been appointed as a Provincial Court Judge to Southern Region, effective November 6, 2018.

Melanie S. Hayes-Richards has been appointed as a Provincial Court Judge to Edmonton Criminal, effective November 6, 2018.

Cheryl L. Arcand-Kootenay has been appointed as a Provincial Court Judge to Edmonton Region, effective November 6, 2018.

The Honourable Judge D.R. Shynkar (High Prairie) has been designated as the Assistant Chief Judge for the Northern Region of the Provincial Court of Alberta (Grande Prairie), effective October 17, 2018.

COURT OF QUEEN'S BENCH

The Honourable Mr. Justice J. Langston (Lethbridge) has retired, effective December 31, 2018.

Susan L. Bercov, Q.C., has been appointed a Justice of the Court of Queen's Bench of Alberta (Edmonton), effective November 21, 2018.

Alice Woolley has been appointed a Justice of the Court of Queen's Bench of Alberta (Calgary), effective November 21, 2018.

The Honourable Madam Justice J.M. Ross (Edmonton) has elected to become a supernumerary judge effective November 5, 2018.

UNSUNG **HERO**

VINCENT **WONG**

BY **JOSHUA SEALY-HARRINGTON**

VINCENT **WONG**

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.

For this edition of Law Matters on Canada's international legal obligations, I had the privilege of sitting down with Vincent Wong, an impressive young Canadian lawyer. Vincent is a Human Rights Fellow at Columbia Law School (**www.law.columbia.edu/news/2018/10/2018-2019-human-rights-fellows**), a prestigious position demonstrating his exceptional experience and potential in international human rights advocacy. Before coming to Columbia, Vincent worked as a Staff Lawyer for the non-profit Chinese and Southeast Asian Legal Clinic, where he used his cross-cultural background — he was born in Hong Kong, but raised in Canada — to provide legal services to Ontario's Chinese, Vietnamese, Cambodian, and Laotian communities. And, on a more personal note, Vincent's intellect and kindness are immediately apparent. We met early on in the LL.M. program at Columbia over a passionate discussion about recent Supreme Court jurisprudence adversely impacting the Chinese and Southeast Asian community; there is not doubt in mind that Vincent will be making waves in the Canadian and international legal community in the years to come.

1. What is your general impression about the effectiveness of human rights mechanisms at securing and promoting human rights domestically and internationally?

Generally, my view is that mechanisms aimed at protecting human rights are going to be very limited if they cannot result in a legally binding remedy. International human rights treaty bodies face this problem all of the time, where their recommendations are routinely ignored by States. But even when compliance rates are low, there is still some compliance, which can mean a great deal for those affected. The international human rights system can also act as a much-needed vehicle though to apply political pressure to States who refuse to respect human rights or are violating human rights en masse. But when it comes to building an effective system for respecting, protecting, and fulfilling human rights, the heavy lifting must be done at the domestic and regional level given our current state of world politics. That is where human rights are made justiciable and can be made an integral part of policy making in all aspects of governance. People also need to remember that human rights permeates many more spheres of public life than those which are explicitly labelled "human rights". Our criminal justice system, housing laws, cybersecurity policies, labour laws, immigration system, and relationship with Indigenous Peoples (among others) all necessarily implicate internationally recognized human rights — even if that is not immediately obvious in the title.

2. How have your respective experiences in Canada and the United States informed you about what each country does right and wrong regarding human rights, and in terms of how countries should generally approach human rights?

Every country has its own unique challenges when it comes to human rights, but we should not accept the premise that human rights and their substantive contents are subject to whatever a particular country's government thinks. All countries have a duty to respect, protect, and fulfill their human rights obligations. We also need to realize that the human rights issues of other countries increasingly affect us in this interdependent world. For example, Trump's policies on refugees has foregrounded the Safe Third Country Agreement and the political reality that Canada cannot take even America's human rights record for granted. A turn for the worse in the human rights situation in one country oftentimes generates difficult political, legal, and moral questions for its neighbours.

3. Have your practical experiences in human rights generally left you more or less optimistic?

Much more optimistic. I've had the privilege of working under someone who I personally think is one of the best Canadian human rights lawyers of this generation — Avvy Go of the Chinese and Southeast Asian Legal Clinic. The clinic provides free legal services to low-income and non-English speaking members of the Chinese, Vietnamese, Cambodian and Laotian communities in Ontario. Working at the clinic and learning from Avvy and my other colleagues has been an amazing experience and a testament to what impact a grassroots legal organization can do to further the human rights of the most vulnerable. Whether it is doing casework, law reform, test case litigation,

community organizing, or public education, the experience has taught me there are a whole host of effective methods to do human rights work.

4. What is the most rewarding human rights experience you've had so far?

There has been a lot of them. I would say the happiest I feel is when I stay a deportation or win a humanitarian and compassionate case that keeps a family together here in Canada. Seeing the joy on the faces of the parents and children is definitely memorable, particularly in light of the hardships that they had to go through up to that point. I am also privileged in being able to speak Cantonese and have these clients feel comfortable in opening up to me about their very personal stories of struggle and resilience — stories that they might not be able to get through to other legal clinic lawyers.

5. What contemporary human rights issue interests you the most, and why?

I am most interested in the intersection between global migration and human rights. Countries around the world are doubling down on restrictions at their borders and within their immigration and citizenship systems, but the push factors of migration will continue to get stronger and stronger. Climate change alone will likely create hundreds of millions of refugees in this century. What are we doing to prepare for this? Is the solution for human migration in the 21st century spending all of our money and energies building walls, greater immigration enforcement and border security, and separating the children of migrants from their families? Surely there are better, more comprehensive, and more creative policy solutions that we can come up with that sufficiently respect national sovereignty, facilitate human mobility, and fulfill human rights obligations. But that conversation is currently not happening in what is a highly politically and emotionally charged discourse in Canada and elsewhere.

6. People are sometimes critical of law students citing an interest in "human rights", and claim that there are no real opportunities in that field. What would you say in response to that, and what would you recommend to law students or young lawyers interested in working on human rights issues?

I think a lot of people come in with a somewhat skewed notion of what a human rights career entails. They hear human rights and immediately think of a job with a large international NGO like Amnesty or Human Rights Watch, or a position with a human rights commission or a Geneva-based human rights body. If you think narrowly in this way, then yes, the opportunities are quite limited. But as I mentioned earlier, human rights encompass a much broader section of work. If you are a criminal defense lawyer, you are protecting your client's right to a fair and speedy trial, the presumption of innocence, and due process. That is human rights work. If you work with trade unionists, you are protecting your client's right to work and achieve an adequate standard of living. That is human rights work. There is no need to lament the seemingly limited professionalized opportunities in human rights when one takes a broader view of what human rights work is and how human rights defenders around the world are creatively doing their work. If students keep that in mind, then I am sure they can find something in their legal careers to scratch that itch.

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.

YOUNG CANADIAN LAWYERS **FOR UNIVERSAL HUMAN RIGHTS**

BY **AMANDA BAHADUR**

The Canadian Bar Association (CBA) has been empowering young lawyers since 2002 through its International Initiative: the Young Lawyers International Program (YLIP). The CBA's International Initiatives are dedicated to the global development of the rule of law and access to justice. The YLIP, in particular, sends recent graduates and young lawyers to developing countries for substantive experience in international law. Currently, 28 interns are advocating for human rights and representing Canada in Southern Africa, East Africa, the Caribbean, Central Asia, Southeast Asia, Eastern Europe, and the Balkans.

The YLIP is supported by the Government of Canada through funding from Global Affairs Canada (GAC). With this round of funding, GAC has provided for 32 CBA interns each year until 2022 to work with various rights based organizations on human rights programming, the rule of law, and constitutional reform in developing countries. The eight-month internship includes a six-month overseas placement with pre-departure and reintegration activities in Canada. A pre-departure briefing equips interns to best contribute to their placement organization and succeed overseas. The 2018/2019 cohort received formal training on trauma-informed lawyering, access to the extensive YLIP alumni network, and advice to adapt to an intercultural work environment. There is a distinct focus on GAC's Feminist International Assistance Policy (FIAP), gender equality, inclusive governance, and environmental sustainability.

The YLIP has a diverse range of partnerships for the 2018/2019 program including international organizations such as UNICEF in Vietnam and the International Development Law Organization in Kyrgyzstan, and localized agencies such as The Legal Assistance Centre in Namibia and the Legal Resources Centre in South Africa. I am placed in Guyana until March 2019 at the Society Against Sexual Orientation Discrimination (SASOD). SASOD is the leading organization in Guyana fighting for gender equality and LGBTQ+ rights.

As with many countries around the world, the LGBTQ+ community in Guyana faces heavy prejudice and discrimination with few legal protections. Same-sex intimacy remains illegal, and until recently, cross-dressing was also illegal. The lack of legislative protection for the LGBTQ+ community emboldens those who act discriminatorily and justifies prejudice against the community. What I have found particularly disheartening is how palpable and blunt intolerance and hatred can be due to entrenched cultural norms of gender identity and gender roles. Derogatory slurs are used in common conversation and violence against the community is discussed causally, often in jest. As a result, LGBTQ+ victims of hate crimes rarely report violent incidents out of fear of further discrimination at a police station or hospital; and those that do report often do not mention any biased motivation. In response, SASOD works to reform legislation to increase protection of the LGBTQ+ community. In November 2018, SASOD was instrumental in having the law that criminalized cross-dressing struck down by the highest court of appeal in the Caribbean, the Caribbean Court of Justice (*McEwan et al v AG of Guyana*, [2018] CCJ 30 (AJ)).

During my internship at SASOD, I have been able to document many incidents of discrimination and provide assistance to victims, however, it can be difficult to proceed with cases as victims fear family and friends finding out about their lifestyle more than they fear an offender. This can be difficult to relate to as a Canadian citizen, where we are privileged to hold justice in high regard. Listening to these stories has made me acutely aware that my privilege is solely based on the location of my birth and compels me to use that privilege to support those who are not so geographically gifted. The economic conditions of developing countries are undoubtedly a factor as fear, and by extension prejudice, is exacerbated when people are struggling to meet basic needs. The broader implications illustrate the importance of countries with vast resources supporting fundamental human rights globally.

Legal change is a first and necessary step to address inequality but social change will have the greatest impact on the community. This is where the YLIP shines. Sending interns straight into the environment allows for direct results from on the ground efforts. With SASOD, I have been able to facilitate safe spaces for LGBTQ+ persons and advance education in the community. Immediate collaboration has been the most powerful approach to inspire understanding and mutual respect. It is difficult for one to be tolerant with the belief that they are amongst a majority, living a "normal" lifestyle, and that there are a few remote others trying to corrupt that norm. However, sexuality, gender identity, and gender expression are fluid concepts depicted on a spectrum that can change over time. The idea that a person unequivocally and perpetually identifies at one end of the spectrum, the cis-gender heterosexual "normal", is more unrealistic than the alternative. In essence, this seems more likely to be the minority. Contextual understanding is key to social change and is most effectively imparted through grassroots efforts like the YLIP. Entrenched cultural norms means progress will take time, but internships such as this provide an opportunity for cross-cultural learning and common understanding that can lead to positive change.

The Government of Canada has made universal human rights a priority by supporting not only the YLIP, but other CBA International Initiatives such as Supporting Inclusive Resource Development in East Africa and National Legislative Development in Vietnam. The YLIP is a uniquely rewarding opportunity for young lawyers to gain hands on training. My perspective is only one intern's experience; the YLIP has sent over 100 interns to advocate on the ground for human rights. GAC has equipped young lawyers to contribute to Canada's international legal obligations during their placement as well as after, and has committed to do doing so for the next four years. Canada's most marked display of international priorities is its investment in the latest class of human rights defenders.

AMANDA BAHADUR, born and raised in Calgary, Alberta, was called to the Bar of Ontario in January 2018. She is now a 2018/2019 intern with the CBA's Young Lawyer's International Program, stationed in Guyana, South America where she is advocating for gender equality through legal and social change.

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WILL SEARCH: JUTTA WALLIS-TRNCEVIC, also known as JUTTA WALLIS and JUTTA TRNCEVIC, late of Edmonton, died October 28, 2018. Please contact **The Estate House by Gorman & Koski LLP, Attn. Douglas G Gorman, at 780-451-7557 ext. 225.**

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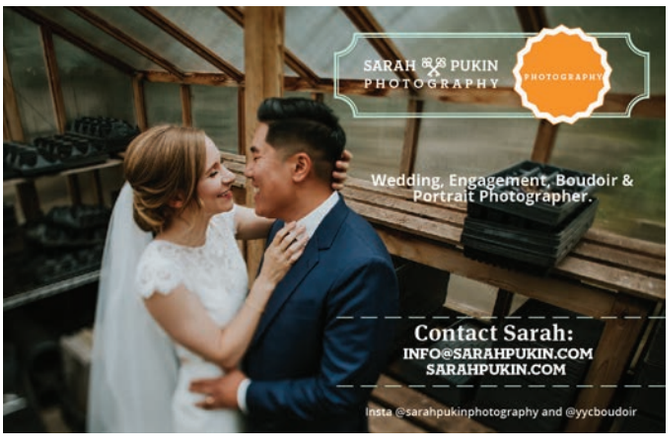

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