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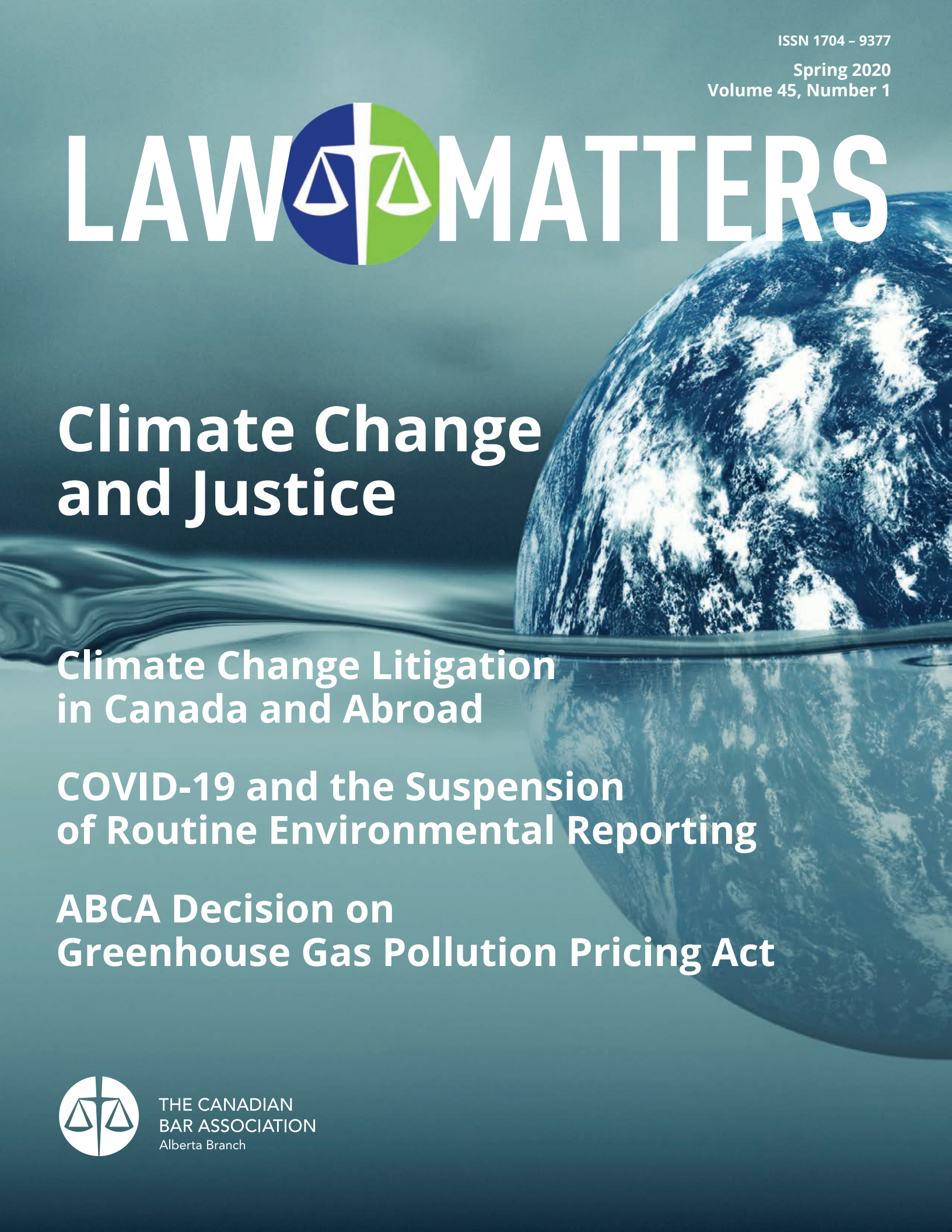
LAW MATTERS



Climate Change and Justice

Climate Change Litigation in Canada and Abroad

COVID-19 and the Suspension of Routine Environmental Reporting

ABCA Decision on Greenhouse Gas Pollution Pricing Act

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITORS' **NOTE**

BY **JESSICA ROBERTSHAW** & **JOSHUA SEALY-HARRINGTON**

At the beginning of February, the *Law Matters* Editorial Committee met for its annual brainstorming session regarding topics for the magazine in 2020, landing on the topic of climate justice and the law. At that time, COVID-19 had not yet manifested to its current scope and significance, so though it would have been particularly timely, this print edition of *Law Matters* is not dedicated to the COVID-19 pandemic. However, as part of *Law Matters* migration onto a digital platform, our spring publication includes a series of online-only articles exploring various facets of the COVID-19 pandemic, and its impact on legal practice. Further, in assembling this edition, we have noticed several parallels between the issues presented by climate change and the COVID-19 pandemic.

Climate change and the pandemic show us both the frailty of human society, and the importance of resilience (while mindful of how one's resilience is inextricable from their privilege). Regardless of how climate change litigation and legislation develops, or how reporting requirements for the environment and investors take shape, we will, both as people and as a profession, need to be innovative, flexible, and resilient, so as to adjust to our changing realities. These are the very same qualities that have been demanded of the profession throughout the pandemic. As noted in this edition's Practice Advisor column by Elizabeth Aspinall, the profession of law has been notoriously slow to adapt to change, but in the last 2 months, we have seen the profession and courts make tremendous efforts to ensure that the wheels of justice keep turning, even when almost every aspect of practice has been changed or disrupted. So, while climate change, and its intersection with justice will still be a significant issue to tackle long after social distancing has ended, the profession has shown that it can rise to the challenges it will present. Critically, though, we have also witnessed the disastrous—indeed, fatal—consequences of not acting in advance and with precaution to looming threats the effect of which are amplified by our increasingly interconnected lives.

In this edition, Dustin Klaudt, a lawyer currently pursuing his LLM in climate litigation, provides us with a comprehensive history of climate litigation across the globe, with a focus on the strategy and results of that litigation and how it may shape Canada's judicial responses to similar claims.

In a unique intersection between climate justice and COVID-19, University of Calgary Law Professor Shaun Fluker has outlined the impacts of COVID-19 and the suspension of routine environmental reporting in Alberta, which raises a number of questions and concerns about both the immediate impact of those decisions and the leadership of the provincial government in regards to climate change issues.

Matthew Huys and Daniel Downie discuss the *New York v Exxon* litigation regarding Exxon's alleged misrepresentations about the cost of future climate change to investors. And, in a similar vein, David Tupper, Jeff Bakker, Brendan MacArthur Stevens and Peter Moorman discuss the changes to public disclosure of climate change related risks. These two articles highlight the importance of ensuring transparency regarding climate change risks and costs, while warning of changes to come as corporations navigate shifting guidance and standards.

Meredith James and Steve Major provide a spirited point/counterpoint regarding the proposed CBA resolution for climate justice which demonstrates that, while many appreciate the importance of climate change action, the determination as to which actions to take and how climate goals are best achieved, remains contentious.

Finally, *Law Matters* is also proud to announce that the magazine will be moving to a digital platform in the coming months, which will increase our ability to provide readers with content that is immediately responsive to current events, developing case law, and professional trends. As we start that transition, we have, as noted, a selection of articles regarding COVID-19 and the profession that can only be found on our online platform at www.nationalmagazine.ca/LawMatters. Going forward, much historical and current *Law Matters* content will be available there. These articles include a discussion of family law and COVID-19 by Emily Varga at Jones Divorce Law, insurance claims in the face of pandemic losses by Michel Doerksen at Field Law, the changing landscape of criminal law and COVID-19 by Nicole Rodych at Ruttan Bates, and remote dispute resolution with John Paul Boyd, QC.

Stay healthy, safe and happy reading.

Cover Art: Rising Sea Level (iStock.com/freie-kreation)

In This Issue

Contributing Authors

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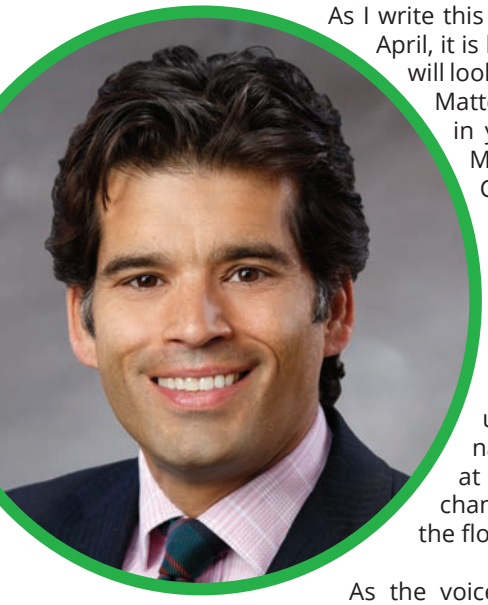
PRESIDENT'S **REPORT**

BY **OLA MALIK**



As I write this report to members in late April, it is hard to say what our world will look like when this issue of Law Matters lands on your desks and in your email inboxes in late May. In a very short time, the COVID-19 outbreak has had a profound impact on all of us – on how and where we work and connect with our clients and work colleagues, how we live our lives with our kids and family, and how all of us are helping our clients navigate our justice system at a time of adaptation and change. And then to top it off, the flood in Fort McMurray!

As the voice of the legal profession, the CBA regularly engages with various stakeholders including the courts, government, the Law Society of Alberta, and various other legal associations. Today is no different. COVID-19 has required all of us to work together in finding new ways to practice our profession and to ensure that our courts remain open and accessible for the work we do for our clients.

Our profession is undergoing an immediate crisis, the likes of which we have not seen in our lifetime. Our members know that their professional lives will not quite look the same when they return to work. Some may not have jobs to return to and others may see their work environment greatly changed. There is, understandably so, a great deal of apprehension about what the practice of law post-COVID will look like.

There's little question that COVID-19 has exposed fundamental structural shortcomings in our system of administration of justice. Addressing this may well require, as some have argued, a complete re-imagining — and big systems change. This is a critically important discussion we cannot avoid, and we will continue to engage our members in answering the big questions that address these shortcomings in our justice system in the coming weeks, months and years.

To this end, in April I had the pleasure of hosting a webinar series with Alberta's courts where we addressed the immediate challenges posed to the legal profession by the COVID-19 outbreak. We first heard from the Court of Queen's Bench of Alberta with Chief Justice Moreau and Associate Chief Justice Nielsen, and then held a second session with the Provincial Court of Alberta where we were joined by Chief Judge Matchett, Deputy Chief Judge McLellan and the team of Assistant Chief Judges. Both sessions are available to all CBA Alberta members to watch on demand on our website, and I encourage you to visit www.cba-alberta.org/COVID-19 to access these and other resources related to the pandemic.

I am proud of the transition that our organization has made to provide relevant programming to our members remotely. In a relatively short amount of time, our Sections changed gears and began providing their content to members by webcast. In order to strengthen the community of our members in the face of physical distancing requirements, we also made the decision to offer webcast Section meetings to all active CBA Alberta members at no charge. On behalf of our Board of Directors, I want to extend our thanks to the Section Executive Committees for their leadership during this time of transition, and for providing programming to our members to help us all make sense of our "new normal" and the impacts on our practices.

This is a time of transition for our magazine as well. This current issue marks the penultimate issue of Law Matters to appear in print. After the summer 2020 edition, we will be moving to a fully digital publication, assisted by CBA National. As indicated in the Editors' Note for this issue, you can find some online exclusive content related to the COVID-19 outbreak on our website and our new digital platform at www.nationalmagazine.ca/LawMatters. I have been passionate about our branch publication since long before my time on the CBA Alberta Executive Committee and am impressed with the direction it has taken in the last several years under the leadership of our current editors. I want to thank our editors and the entire Editorial Committee for their efforts in transitioning Law Matters to a fully digital publication and look forward to seeing the results of these efforts as we move to the new platform.

We are nearing the end of election season at CBA Alberta, with the elections for our vacant Board Directors and Secretary positions closing on June 1. All eligible voting members of CBA Alberta will have received an electronic ballot through Simply Voting in your email inbox in early May. If you have not already done so, I encourage you to submit your votes for your candidates of choice. I could not be more pleased by the strong and diverse group of members running for the Board Directors and Secretary positions this year and know we will be well-served by the successful candidates. You can familiarize yourself with the group of candidates on our website at www.cba-alberta.org/Election.

The Agenda for Justice & Advocacy Committee has recently finalized our new Public Statement and Submissions Policy, which governs submissions made to public bodies or statements made to the media by members on behalf of CBA Alberta. Advocacy is an important part of the work that we do, and it is becoming increasingly common for the provincial government to reach out to CBA Alberta for public policy consultations. We often rely on the subject matter experts in our Sections to provide feedback for such requests and appreciate the assistance of our Sections and members in coordinating this feedback. I encourage our members to review this policy on our website at https://cba-alberta.org/Who-We-Are/Governance/Policies.

In closing, I want to extend my best wishes to our members, their staff and colleagues, and their families for your continued good health. While we all may feel disconnected from our colleagues as we continue to physically distance and work from home, the value of the community that we foster at CBA Alberta becomes more important than ever. For however long this "new normal" lasts, we are committed to continuing to build and strengthen this community and find new ways for our members to engage.

ON DEMAND

The Canadian Bar Association - Alberta Branch presents **REMARKS FROM THE COURT OF QUEEN'S BENCH OF ALBERTA.** On demand webinar. View online at https://www.cbapd.org/details_en.aspx?id=ab_ab20cep02o.

The Canadian Bar Association - Alberta Branch presents **REMARKS FROM THE PROVINCIAL COURT OF ALBERTA.** On demand webinar. View online at https://www.cbapd.org/details_en.aspx?id=ab_ab20cep03o.

The Canadian Bar Association - Alberta Branch presents **MANAGING DURING THE PANDEMIC: AN 'OUTSIDE THE BIG CITIES' ROUNTABLE DISCUSSION.** On demand webinar. View online at https://www.cbapd.org/details_en.aspx?id=ab_ab20gen01o.

MAY

27: The Alberta Lawyers' Assistance Society presents **VIRTUAL YOGA.** Live webinar, weekly on Wednesdays. More information at http://albertalawyersassist.ca/news-events/.

29: The Ontario Bar Association presents **TECHNOLOGY AND OTHER HACKS BY DESIGN.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=ON_ON20OBA04X.

JUNE

2: The Ontario Bar Association presents **18TH ANNUAL OSC, TSX AND IIROC UPDATED.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=ON_ON20BUS04X.

4: The Canadian Bar Association presents **LITIGATION FUNDING.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW23A.

4: The Ontario Bar Association presents **GOING UNDER COVER: COVER FOR NON-COVERAGE LAWYERS.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=ON_ON20INS11X.

10: The Canadian Bar Association presents **BILL C-46: IMPAIRED DRIVING OVERHAUL.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW08A.

16: The Canadian Bar Association presents **HAPPY TOGETHER: PRIVACY & COMPETITION LAW IN A DIGITAL ECONOMY.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW24A.

17: The Ontario Bar Association presents **CAPACITY FOR LAWYERS: ELDER AND CORPORATE CLIENT MATTERS.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=ON_ON20ELD02X.

22: The Ontario Bar Association presents **ACCESS TO JUSTICE: HOW TO BE AN ALLY.** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=ON_ON20OBA27X.

24: The Law Society of Alberta presents **PRACTICE MANAGEMENT 101: LIFE CYCLE OF A FILE** Live webinar. Register online at https://www.lawsociety.ab.ca/event/practice-management-101-webinar-life-cycle-of-a-file/.

25: The Ontario Bar Association presents **DOING BUSINESS INTERNATIONALLY SERIES: DOING BUSINESS IN AFRICA** Live webinar. Register online at https://www.cbapd.org/details_en.aspx?id=NA_NA20INT01A.

SAVE THE DATE

SEPT 23-25, 2020: Pro Bono Law Alberta presents **THE 8TH ANNUAL NATIONAL PRO BONO CONFERENCE.** Hotel Arts, Calgary, AB. For more information, visit https://probonoconference.ca/

Submit your upcoming events or professional development sessions to communications@cba-alberta.org. Please include the organization hosting the event, the event title, and the link for registration or more information.

Hon. John (Jack) Major, C.C., Q.C.
Mediator & Litigation Consultant

Jack Major served as a member of the Supreme Court of Canada from 1992 to 2005, and as a member of the Courts of Appeal of Alberta and the Northwest Territories from 1991 to 1992. Prior to his judicial service, he was a leading commercial litigation practitioner with Bennett Jones LLP, where following his judicial service, he continued as counsel until March 2020.

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IS IT TIME TO LET THE **NOTICE TO ADMIT FINALLY COME OF AGE?**

BY **TAMARA PRINCE** AND **ALLISON KUNTZ**

Based on our anecdotal sampling of litigators, it is hard to find one who does not agree that utilizing the *Notice to Admit* found at Rule 6.37(1) of the *Alberta Rules of Court* is a good idea, at least in theory. We are all obliged under Rule 1.2(3) to work together to achieve the purpose of fairly and justly resolving a matter in a timely and cost-effective way, including by identifying the real issues in dispute and facilitating the quickest means of resolving a claim with the least expense. The Notice to Admit seems to be a way of doing just what the Rules require us to do.

You'll recall that Rule 6.37(1) permits a party to call on another party to admit certain facts or opinions, and a response is required within 20 days. If the Responding party does not respond to any of the facts or opinions they are deemed to be admitted. If the Responding party denies any of the admissions sought it must explain why, or if it is refused based on issues of irrelevance or privilege. Ultimately, if a party denies or refuses a fact or opinion that is ultimately proved at trial, there should be costs consequences under Rule 10.33(2)(b).

It is easy to see how a *Notice to Admit* might efficiently advance a claim or narrow issues early in a proceeding. In fact, there are many able advocates in Alberta who do use the Notice to Admit routinely, sometimes even serving one along with a Statement of Claim, or shortly after, and even in complex cases. As Justice Martin (as she then was) said in *Andriuk v Merrill Lynch Canada Inc.*, 2011 ABQB 59, "While a Notice to Admit may be useful, as noted in *Southern Petroleum*, to crystallize certain facts after discovery and before the trial begins, it is also useful at other times, including the beginning". In that case, Justice Martin found that the service of a Notice to Admit on defendants in a class action before certification was appropriate. Done early in a proceeding, a Notice to Admit can limit or even replace questioning.

So, why don't we all use the Notice to Admit as a matter of general practice? The reluctance to do so could be a hangover from a time in years past when it was almost impossible to get a meaningful response. Or perhaps it is because it is not a mandatory step. In any event, should we litigators be engaging the Notice to Admit more routinely?

There is a dearth of case law dealing with the use of the Notice to Admit, although perhaps this will change as the tool becomes deployed more and more routinely. What we can glean for now from the decisions is that (a) the Notice to Admit must be responded to meaningfully without "additional" narrative; (b) admission can be withdrawn only in certain circumstances; and (c) we cannot always count on a Notice to Admit as a step to advance our case (in the context of an argument for long delay)

With respect to the required content of a reply to a Notice to Admit, in *Annett v Enterprise Rent-A-Car Canada Ltd*, 2019 ABQB 734, the Alberta Court of Queen's Bench had to consider the evidentiary effect, if any, of a reply that included purported admissions along with additional alleged "facts". The Respondent proposed that the "additional" information provided in her Reply to the Notice to Admit should be considered as evidence, but the Court refused. It stated at para 25:

> Subrules 6.37(3) and (5) do not permit a party to add information to a reply and by so doing increase the scope of the admitted facts, transforming the facts put to the replying party into those facts plus additional facts that the replying party wants admitted. If a party wishes additional information to be admitted by its opponent, it can file its own Notice to Admit Facts. Put another way, a Reply to a Notice to Admit Facts is not a Counter Notice to Admit Facts.

In determining the circumstances where a deemed admission under Rule 6.37 could be withdrawn, the Alberta Court of Appeal in *Stinger v Empire Life Insurance Company*, 2015 ABCA 349, considered the test for setting aside admissions and confirmed that permitting a litigant to withdraw an admission requires a balancing of the competing objectives of prejudice to the party who relied on the admission and the discouragement of making admissions if they could never be set aside. The Court applied the general test for setting aside admissions, i.e. whether the admission was inadvertent, whether there was an explanation for permitting the admission, if there was delay in moving to withdraw it, whether there is evidence to support that the admitted fact may not be true, and whether any prejudice to the other side could be remediated with costs.

The Alberta Court of Appeal considered the effect of a Notice to Admit and its response on an argument for dismissal for long delay in *Jacobs v McElhanney Land Surveys Ltd.*, 2019 ABCA 220. The Court held that in order for a Notice to Admit to potentially advance a claim, it must produce admissions (even through no response) apart from those already contained in pleadings. A Notice to Admit that results only in a response claiming it is "irrelevant, improper or unnecessary" has no legal effect and therefore cannot be said to advance a claim. This hearkens back to the 2008 Court of Appeal case of *Bourne v Alberta*, 2008 ABCA 165, where Justice Côté on behalf of the panel commented on the effect of a Notice to Admit (under the old Rules) in a case of dismissal for delay. In likening the Notice to Admit to merely booking an examination for discovery, Justice Côté found that service itself of a Notice to Admit has no legal consequence until there is an admission, an unreasonable refusal, or the laspe of time for a reply.

In summary, many of us have spent hours and days working with counsel opposite on the eve of trial to come up with an Agreed Statement of Facts for submission to the Court. We know it is expected of us, and we work hard to make it happen. Maybe we can use the same commitment with a Notice to Admit—what do we really have to lose?

TAMARA PRINCE is Legal Counsel at Canadian Natural Resources Limited. She has experience in a variety of litigation matters, including complex commercial litigation and arbitration, energy litigation, class action defence, employment defence, among others.

ALLISON KUNTZ is a partner in the litigation department in the Calgary office of Norton Rose Fulbright Canada LLP. Her practice includes corporate and commercial litigation, domestic and international arbitration, oil and gas litigation, as well as securities and financial services disputes.

CLIMATE CHANGE LITIGATION IS "HEATING UP" COURTROOMS GLOBALLY **AND NOW IN CANADA**

BY **DUSTIN KLAUDT**

Climate change is a hot topic in several Canadian courts. Legal observers are likely familiar with the ongoing intergovernmental battle over carbon pricing that has been bubbling up to the Supreme Court of Canada (now scheduled for hearing in September). Alberta's Court of Appeal recently diverged[1] from the trend set by appellate courts in Saskatchewan[2] and Ontario[3] finding Canada's national carbon pricing legislation constitutional and an appropriate use of federal jurisdiction under the division of powers. These observers also might be familiar with the constitutional challenge[4] launched in the Federal Court by a group of children and teens from across Canada last fall, inspired by both the recent visit and work of international activist Greta Thunberg, and the Fridays for Future movement. It may be surprising to many, however, that these high-profile actions are the tip of the fast melting iceberg when it comes to climate litigation, both before Canadian courts and in foreign and international fora.

A report[5] by the UK's Grantham Institute in May 2019, quantified climate litigation globally, and a staggering 1,328 climate litigation matters had been brought by that time. The bulk of litigation is in the US (1,023 matters) with Canada ranking in 6th position globally with 16 matters (as of today there are at least six more matters[6] for a total of 22).

The year 2015 was a catalyst for the expansion in climate litigation globally due to two major developments. The global community came together to sign the Paris Agreement, which reaffirmed international commitment to reducing global warming to below 1.5-2 degrees Celsius from pre-industrial levels which is necessary to avoid catastrophic climate change. Earlier that year, a Dutch trial court, in *Urgenda v The Netherlands*[7], had endorsed what would become a major prototype case for using constitutional, international, and other legal obligations to compel national governments to act to reduce greenhouse gas (GHG) emissions (climate change mitigation) to the scientifically sanctioned levels to avoid catastrophic climate change. Both government deviation from policies implementing the scientifically necessary climate change mitigation and the existence of legal precedent for challenging these government failures triggered a global wave of human rights litigation by citizens targeting government policy failures. These developments have also reinvigorated efforts to use human rights and other legal obligations to hold all GHG emitters accountable, governments or private entities.

Fast forward to today, and climate litigation has also proliferated in multiple different forms. There is a wide variety of fora, litigants, GHG causing conduct targeted, causes of action invoked, and climate positive remedies being sought. Globally, climate litigation has mostly been brought in domestic superior courts, however, actions and investigations have also been launched before domestic human rights commissions[8], regional supranational courts[9] (including human rights courts[10]), and international United Nations fora[11]. Plaintiffs have ranged from individuals (of varying ages, backgrounds, and vulnerabilities), public interest organizations, industry groups, and local and provincial governments. Defendants are most often national governments, impugned for both the GHG emissions they produce but also their failure to regulate to effectively mitigate GHG emissions to scientifically verified necessary levels. Individual private emitters, notably the world's largest energy producers, or carbon majors, have also faced litigation globally.

Climate change inducing conduct that has been challenged has varied ranging on a spectrum of actual emissions created by national governments, to regulatory policies encouraging unsafe emissions levels, such as government GHG target setting for emissions or government subsidization of GHG production, to government inaction in promoting any specific climate change mitigation policies. Single laws, policies, and new energy project approvals have been challenged, as have a cumulative collection of these legal measures. Even as seen in Canada with the recent carbon pricing references, the underlying legislative authority to mitigate GHG emissions has been challenged, which has the potential for climate negative consequences.

Causes of action invoked have included domestic constitutional law, international climate commitments and other human rights obligations, criminal law, tort law, trust law, and securities law, to name a few. Remedies sought have been equally varied ranging from simple declarations that GHG reduction targets are insufficient, mandatory orders compelling governments to create or enforce climate positive laws and policy, denial of energy project approvals, requiring GHG budgeting processes and courts taking supervisory jurisdiction to police their remedial orders.

1 http://canlii.ca/t/j5dc0

2 http://canlii.ca/t/j03gt

3 http://canlii.ca/t/j16w0

4 https://www.cbc.ca/news/canada/british-columbia/canadian-teens-lawsuit-federal-government-over-climate-change-1.5335349

5 http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf

6 http://climatecasechart.com/non-us-jurisdiction/canada/

7 https://www.urgenda.nl/en/themas/climate-case/

8 http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/

9 http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/

10 http://climatecasechart.com/non-us-case/request-advisory-opinion-inter-american-court-human-rights-concerning-interpretation-article-11-41-51-american-convention-human-rights/

11 http://climatecasechart.com/non-us-case/un-human-rights-committee-views-adopted-on-teitiota-communication/

This article will focus its further review on several notable global actions involving administrative, constitutional, human rights, and international law, and analogous extant Canadian actions that invoke similar legal claims. These foreign cases are arguably more likely to inspire transnational judicial dialogue and resort to comparative law by Canadian judges in adjudicating domestic problems. Other simmering climate litigation matters in Canada, such as the carbon pricing references or cases seeking to invoke legal defences such as climate necessity for civil disobedience against new energy projects[12] are noteworthy, however, less likely to be influenced by foreign judicial decisions, given the idiosyncratic nature of Canadian federalism and criminal law.

Recent Foreign Climate Litigation

There have been several major successes with recent international litigation, however, this success has not been universal. Three foreign matters are noteworthy and may prove persuasive for ongoing Canadian climate change litigation. The prototype *Urgenda* case recently reached its apex court with the Supreme Court of the Netherlands ruling that the Dutch government needed to adhere to a more ambitious climate change target. The Court of Appeal for England and Wales also recently rejected an approval of a third runway at Heathrow Airport for failure to consider international climate change commitments under the Paris Agreement in the assessment process. Finally, in the US, the Ninth Circuit appeals court recently rejected claims that the US federal governments collective climate policies and a project approval in Oregon violated constitutional rights.

In December 2019, the Supreme Court of the Netherlands recently ruled[13] in the conclusion of the *Urgenda* decision. It upheld trial and lower appellate court findings that the Dutch government was required to raise its GHG reduction ambitions, in order to avoid dangerous climate change and respect its citizens' constitutional rights. The case was brought by a public interest group, in a representative action on behalf of 886 Dutch citizens against the Dutch state government for failure to establish a GHG reduction target that met scientifically prescribed standards to avoid dangerous climate change. The Court reiterated the legitimacy and importance of the United Nations Framework Convention on Climate Change ("UNFCCC") climate negotiations process, the international agreements derived therefrom (including the Paris Agreement of 2015, and the scientific advisory process underpinning those negotiations coordinated by the Intergovernmental Panel on Climate Change ("IPCC")). Though the Court did not find that the Paris Agreement Article 2 obligations to hold global warming to below 1.5-2 degrees Celsius of pre-industrial temperatures directly enforceable, it applied that international treaty obligation as an interpretive tool in determining the scope of constitutional human rights obligations under Articles 2 (life) and 8 (private and family life) of the *European Convention on Human Rights*, which are directly enforceable under the Dutch Constitution. The Court departed from the approach taken by the trial court to frame the operative legal duties under Dutch negligence law (bolstered by constitutional duties) and instead affirmed that constitutional duties required the state to increase its climate targets. In articulating the precise GHG reduction standard necessary to meet these constitutional obligations, the Court relied on the scientifically accepted standard in the IPCC's Fourth Assessment Report (2007) of a 25-40% reduction in GHG emissions from 1990 levels by 2020 (to meet the 2 degrees Celsius threshold). The Dutch government's proposed GHG reduction policy of 20% reduction (1990 levels) by 2020 was insufficient and the state was ordered to raise the target to 25%. Though the state raised several defenses, including that its portion of global GHG emissions was relatively minute or *de minimis*, those arguments were rejected. Further state concerns that such an order was effectively judicial legislation, or a disrespect for the separation of powers, were also rejected. "The Court did not order the state to create any specific legislative content rather it simply declared that the state's current policy was unlawful and the state was required to substantiate the policy it proposed.

In February 2020, the England and Wales Court of Appeal, in *Plan B Earth v Secretary of State for Transport*[14], remitted an environmental assessment approval back to the Secretary of State for their failure to adequately consider the climate change impacts of the addition of a third runway at London's Heathrow Airport. This judicial review was brought by multiple non-profits and municipalities. The Secretary specifically failed to consider the Paris Agreement. The Court did not say that the consideration of the Paris Agreement must lead to any particular outcome, however, did find it unlawful to completely fail to consider the Paris Agreement which was "so obviously material" despite it not being directly incorporated into EU or domestic UK law. Relevant provisions of the UK *Planning Act* and an EU level directive did not specifically reference the need to reference the Paris Agreement or international agreements generally, however, the Agreement was nonetheless essential to consider given the sustainable development obligations under the *Planning Act* to have regard to the desirability of "mitigating, and adapting to, climate change". Furthermore, the precautionary principle found in international law from the Rio Declaration of 1992 and in the case law of the European Court of Justice was utilized to justify the specific need for review of the non-CO2 effects of the approval and the emissions post-2050, which were not considered, and were required given the necessity of reviewing the project in light of Paris Agreement commitments. The UK government has indicated they will not appeal the ruling.

In January 2020, by a 2-1 majority, the 9th Circuit Court of Appeals, in *Juliana v United States*[15], rejected a claim by 21 youth plaintiffs, a non-profit, and a guardian for future generations, against the US government for its continued permitting authorizing, and subsidizing fossil fuel use that contributed to injuries to the plaintiffs, including a comprehensive challenge of government actions causing or contributing to climate change an approval of a liquified natural gas project in Oregon. The challenge is based on legal obligations under the due process clauses and right to equal protection of the law under the Fifth Amendment and the public trust doctrine over natural resources. Remedially, they seek declaratory relief and an injunction ordering the government to implement a plan to phase out fossil fuel emissions and draw down

[12] http://canlii.ca/t/hx2nn

[13] https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf

[14] https://www.bailii.org/ew/cases/EWCA/Civ/2020/214.html

[15] http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf

excess atmospheric CO_2. The Oregon District Court denied the governments motion to dismiss finding standing, justiciable questions and a stated claim for an infringement of a Fifth Amendment due process right to a stable climate capable of sustaining life, free from catastrophic climate change that will cause human deaths, shorten human lifespans, result in widespread damage to property, human food sources, and alter the planet's ecosystem. The District Court also found a danger creation due process claim from government failure to regulate third-party emissions. Finally, the District Court found there was a public trust claim grounded in protection of water resources. The 9th Circuit Court disagreed and allowed the government's appeal on the procedural standing test. The Court found the first two prongs of the standing test were met, (a) a concrete and particularized injury (b) caused by the challenged conduct. The Court, however, found that the third prong of the assessment, that this injury was likely redressable by a favourable court decision, was not met. The Court did not think it could redress the injuries complained of nor that it was within the power of the Court to award the remedies sought. The Court found it was beyond its power to order, design, supervise or implement the plaintiffs' requested remedial plan and that their recourse was more appropriately with the political branches or at the ballot box. The plaintiffs have applied for an en banc sitting of 11 judges of the 9th Circuit Court to further hear the appeal and an eventual hearing at the US Supreme Court may be possible.

Past Canadian Climate Litigation

These decisions can be contrasted with three previous notable Canadian decisions that failed to positively lead to GHG mitigation reductions. Two previous Federal Court challenges to Canada's failures to honor its previous international commitments to reduce GHGs under the Kyoto Protocol were unsuccessful. In *Friends of the Earth v Canada*[16], legislation passed under a minority Parliament, the *Kyoto Protocol Implementation Act* (*KPIA*), was found to create a system of political accountability rather than justiciable legal duties, when the then federal minority Conservative government failed to meet its obligations under that act. Similarly, in *Turp v Canada*[17], the federal government's withdrawal from the Kyoto Protocol was not justiciable as the Crown prerogative over foreign affairs and treatymaking had not been displaced by the *KPIA* or any other legislation. It is notable, however, that the *Turp* decision did not invoke the *Canadian Charter of Rights and Freedoms* ("*Charter*") and the Federal Court opined that the withdrawal's *Charter* compliance would be a justiciable question in a future challenge. Finally, in *Pembina Institute for Appropriate Development v Canada*[18], the Federal Court found that the environmental impact assessment of Imperial Oil's Kearl Oil Sands Project in Alberta (then projected to emit 0.51% of Canada's total emissions) failed to follow Canada's former environmental assessment legislation's (the *Canadian Environmental Assessment Act*, 2012), mandatory consideration of environmental consequences of the project and the impact of potential mitigation measures. This decision ultimately led to a reconsideration of GHG emissions and potential mitigation measures, with the development of a more robust rationale for the decision-maker's ultimate conclusion that mitigation measures will reduce potentially adverse effects of the projects GHGs to be insignificant. However, despite this more robust criteria, the project was ultimately completed. The holdings internationally and past Canadian jurisprudence could both be drawn upon by Canadian courts in ongoing climate litigation and the similarities and differences between each of these claims could hold clues for how future climate change decisions might transpire.

Current Canadian Climate Litigation

In Canada, there are multiple ongoing cases where constitutional human rights, international commitments, administrative and trust law have been invoked as the bases for litigation. In the first major challenge against Canada, *ENvironnement JEUnesse v Attorney General of Canada*[19] ("*ENJEU*"), a Quebec non-profit organization dedicated to environmental education whose membership is mainly youth, seeks to advance a class action. The class action would seek vindication of the group's *Charter* and *Quebec Charter of Rights and Freedoms* ("*Quebec Charter*") rights to life, liberty, and security of the person, equality, and to a healthy environment (the latter only explicitly recognized under the *Quebec Charter*) for Canada setting a GHG target that it knows to be dangerous and that will not limit global warming to 1.5 degrees Celsius. *ENJEU* also alleges that in doing so, Canada's agents have been guilty of an intentional fault under Quebec civil law. *ENJEU* seeks declarations relating to these violations, orders to cease interfering with the rights, punitive damages to each member of the class action, and remedial measures to curb global warming. The Quebec Superior Court has ruled[20] that a class action is not an appropriate procedural vehicle in this case and that it should not be authorized. The Court, however, did rule that the doctrine of justiciability was not an obstacle to the class action sought to be authorized, an important first step for this proceeding, and a stark difference from the previous threshold denials seen in the previous climate litigation matters in the federal courts. This challenge appears to be modelled largely after the Dutch *Urgenda* action, focusing on how Canada's failure to meet certain climate targets is unlawful in a variety of ways, thought it goes further in the remedies sought by seeking mandatory orders and punitive damages.

A second challenge against Canada, *La Rose v Attorney General of Canada*[21], in the Federal Court, is brought by 15 youth (some through their litigation guardians when under the age of majority), supported by both the David Suzuki Foundation and the Our Children's Trust Group coordinating the US *Juliana* action. The youth claim that Canada's conduct knowingly created and condoned GHG emissions causing dangerous destabilization of the climate, which violates *Charter* section 7 rights (life, liberty, and security of the person) and section 15 rights (equality). They further allege that Canada's conduct violates common law and constitutional duties to act in a manner compatible with maintaining a stable climate. Further to these obligations, these youth allege that Canada owes a public trust obligation to protect several public trust resources threatened by climate change, including waterways, the air

16 http://canlii.ca/t/2199k

17 http://canlii.ca/t/fs9wr

18 http://canlii.ca/t/1vxtx

19 http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/

20 http://canlii.ca/t/j1ghh

21 http://climatecasechart.com/non-us-case/la-rose-v-her-majesty-the-queen/

and atmosphere, and the permafrost. The youth seek various declarations pursuant to each legal obligation said to be violated, and also mandatory orders requiring that Canada account for its GHG emissions (including emissions from exports consumed abroad) and to develop and implement an enforceable climate recovery plan (coupled with a request for supervisory jurisdiction to monitor its implementation). This challenge appears to be modeled largely after the *Juliana* action brought in the United States, and appears to be wider in scope than the *ENJEU* action, in terms of both violations alleged and remedies sought.

A third challenge against Canada, *Dini Ze' Lho'Imggin v Her Majesty the Queen*[22], also in the Federal Court, is brought by two Wet'suwet'en House groups (brought on their behalf by their Head Chiefs). The House groups bring a challenge, within the context of the hotly debated Coastal Gas Link liquified natural gas pipeline approval in Northern BC. They allege violations of common law and constitutional duties (including under the section 91 peace, order, and good government clause and *Charter* sections 7 and 15) to keep Canada's greenhouse gas emissions consistent with global warming of 1.5 to 2 degrees Celsius above pre-industrial levels. The House groups specifically impugn the environmental assessment legislation, the *Impact Assessment Act* ("*IAA*") and precursor legislation, for its failure to cease high GHG emitting projects and the lack of a mechanism to cancel approval of high emitting projects if international climate commitments are prevented from being achieved by the continued operation of a particular project. The House groups specifically seek a novel order mandating that Canada amend its assessment legislation to allow for such a cancellation process, in addition to orders for relevant declaratory relief for each alleged violation, accounting of GHG emissions including emissions outside of Canada, and supervisory jurisdiction, as seen in other actions against Canada. This action is similar to the *Plan B Earth* UK action in that it impugns administrative decision-making over environmental impacts, though, with the evolution that the lawfulness of the underlying legislation for environmental assessment is challenged rather than a specific project approval's failure to comply with assessment legislation requiring review of climate change impacts.

This form of constitutional challenge to legislation can also be distinguished from the hybrid administrative law and constitutional challenge, previously brought unsuccessfully by a group of four youth, by way of judicial review to the Federal Court of Appeal, of the similarly controversial Trans Mountain Expansion ("TMX") project, in *Adkin-Kaya v Attorney General of Canada*[23]. This judicial review followed the second approval of TMX, after the Federal Court of Appeal rejected the first approval for failure to adequately consider provisions of the *Species at Risk Act* and failure to comply with the duty to consult owed to Aboriginal peoples, whose contested Aboriginal rights were impacted by the TMX route.[24] The claimants contested the failure to consider their *Charter* section 7 and 15 rights, by failing to consider the impacts to youth of the upstream and downstream GHG emissions resulting from the construction and operation of TMX. Accordingly, it was argued that the Order in Council granting the second TMX approval was unlawful and should be set aside and referred back for reconsideration. The Federal Court of Appeal disagreed[25], citing a procedural bar on re-litigation, as these *Charter* issues were raised for the first time in this second judicial review, as the basis for rejecting this claim. The Supreme Court of Canada later denied[26] leave to appeal that decision. It would, perhaps, remain open to these litigants to bring a fresh challenge, like the Wet'suwet'en House groups, specifically to the statutory regime permitting the *Charter* violation, rather than to failures to apply the legislation to a project review consistent with the *Charter*. Such an approach might find greater success, though, *Charter* review of an administrative decision causing significant GHG emissions may still be possible if such a challenge is brought in the first instance after a judicial review and in a timely manner.

The final challenge of note, *Mathur v Her Majesty the Queen (Ontario)*[27], is different than the other examples in that the litigation target is the Ontario provincial government rather than the federal government. This application, brought in the Ontario Superior Court of Justice by seven youth (and their litigation guardians) and young adults, represented by Ecojustice, challenges the reversal of Ontario's previously more ambitious GHG reduction targets brought about by the new Progressive Conservative Doug Ford government. The applicants allege that the new target, prescribed in provincial legislation, violates *Charter* sections 7 and 15 and a unwritten constitutional principle prohibiting governments from conduct that will, or could reasonably, result in future harm to a significant number of its citizens. They seek corresponding declarations ruling the new legislation of no force and effect, a further declaration that section 7 includes a right to a stable climate system, and mandatory orders that Ontario set a science-based GHG reduction target consistent with Ontario's share of reductions necessary to limit global warming to below 1.5-2 degrees Celsius and for a subsequent revision of Ontario's climate change plan once the new target is set. This action appears to be based on the Dutch *Urgenda* prototype seeking a science-backed GHG reductions target, however, with the added twist of targeting a provincial (sub-national) government and applying a fair share standard relative to

22 http://climatecasechart.com/non-us-case/gagnon-et-al-v-her-majesty-the-queen/

23 https://www.ourearthourfuturevictoria.com/youth-stop-tmx

24 https://www.canlii.org/en/ca/fca/doc/2018/2018fca153/2018fca153.html?autocompleteStr=tslei&autocompletePos=1#_Remedy

25 http://canlii.ca/t/j28lp

26 http://canlii.ca/t/j5pw5

27 http://climatecasechart.com/non-us-case/mathur-et-al-v-her-majesty-the-queen-in-right-of-ontario/

national emissions, which is a more ambiguous and value-laden calculation than was seen in *Urgenda*.

How Past Canadian and Recent Foreign Litigation Might Influence Current Canadian Litigation

At this juncture, no definitive conclusions can be reached on the prospects of success of any of the current Canadian litigation. The full scope of the legal arguments and evidentiary records have yet to be tested in Canadian courts. However, past Canadian judgments, in particular, the *ENJEU* judgment, provide clues as to what counterarguments and defenses may be raised by government throughout these cases. The recent foreign cases also each provide specific hints as to how Canadian courts might decide several of the controversial issues involved in the current cases.

The *ENJEU* judgment signalled an important willingness by Canadian courts to now adjudicate the substantive issue of climate change policy, absent the non-justiciability shackles previously found in the *FOE* and *Turp* decisions. The obiter from *Turp*, accepting that a *Charter* based climate change action would be justiciable appears to have been accepted and now two courts, the Federal Court and Quebec Superior Court have discussed *Charter* climate claims' justiciability, which will likely serve as a foundation for rejecting future government arguments about justiciability. Justiciability concerns from *FOE*, however, specific to a court's inability to substantively remedy climate change, may still resurface, particularly where the remedies sought by claimants deviate from simple declaratory orders into more complex prescriptive orders mandating specific government climate policy. Canada has once again led with non-justiciability arguments in its defence[28] to the *La Rose* claim.

The Dutch *Urgenda* decision is perhaps most notable for articulating the role of constitutional human rights and international law in compelling a court to hold national governments to account on GHG emissions. The contextual importance of international obligations in *Urgenda* and the acceptance of the scientific reduction standards endorsed by the IPCC as mandating the acceptable level of emissions to avoid dangerous climate change, informing the scope of potential violations of human rights provisions, was a pivotal finding. Many of the current Canadian matters set out the context of Canada's commitment to and past failures to honour international obligations, and these ongoing obligations successful linkage with *Charter* rights or other domestic legal obligations will be crucial to establishing the legal basis for a court to act upon. Both *Urgenda*'s continuous emphasis on rights to life and private and family life, as well as the departure from the tort framework adopted at trial to the constitutional rights analysis found by the apex Court, could also signal that a similar constitutional argument focusing on analogous *Charter* section 7 rights to life, liberty, and security of the person, could be the warmest lead on what legal basis Canadian courts might respond to in considering climate change related arguments, contrasted with arguments on other constitutional, common, or civil law bases.

The US *Juliana* decision serves as a cautionary tale against seeking too comprehensive of remedies, that raise judicial restraint concerns. The rejection of the claim by the 9th Circuit Court of Appeal under the standing analysis for lack of redressability, signals that Canadian courts might similarly show reluctance to adjudicate claims where remedies sought are more comprehensive and inherently policy laden. Claims like *La Rose* or *Dini Ze' Lho'Imggin* mandating more comprehensive GHG accounting procedure, response plans, or targeted legislative amendment, coupled with retainer of supervisory jurisdiction, of unfixed duration, may attract similar uneasiness from Canadian courts concerned about the need to police such comprehensive orders and the lack of respect for the separation of powers in granting them in the first place. Courts are perhaps more likely to reject claims for non-justiciability or reject these comprehensive remedies as inappropriate, leaving only declaratory orders with mere symbolic meaning in the face of the global climate crisis. More "targeted" orders based off of international GHG reduction standards, central to the *ENJEU* and *Mathur* claims, which then leave governments open to craft policy to reach the targets, may stand a greater chance of being ruled justiciable and appropriate remedies for any established legal violation. The *Urgenda* decision also rejected defences from the Dutch government that the lower courts target-mandating orders were effectively judicial legislation, which are analogous to these redressability and justiciability or remedial appropriateness concerns.

The UK *Planet B Earth* decision on its face does not appear to be that different than the previous Canadian decision in *Pembina*. The ultimate result was a failure to consider climate change impacts resulting in an order demanding reconsideration. However, the UK decision does go a step further. It was not a failure to consider climate change as a whole, as prescribed by an assessment statute (which was the case in Pembina) but rather the failure to consider international commitments related to climate change under the Paris Agreement that was fatal to the assessment. The natural extension of this reasoning is that future Canadian assessments may be required to assess specific obligations to reduce GHG emissions under the Paris Agreement. The UK Court of Appeal also specifically noted that consideration of non-CO2 impacts and emissions post 2050 are required in an assessment. This step forward of associating particular technical review requirements with mandatory assessment criteria such as the Paris Agreement, could indicate an opening for a more robust assessment of what technical requirements are mandated in climate effects assessment under environmental assessments. The federal government recently enacted the *IAA* with specific references to both "environmental obligations and its commitments" and "climate change" (section 22(1)(j)), without referencing the Paris Agreement. Canadian courts might similarly apply interpretive force to international agreements such as the Paris Agreement or others in interpreting the scope of that associated review of climate change impacts and necessary precaution. The UK's mandatory consideration of the Paris Agreement and specific assessment criteria could be persuasive to Canadian courts and militate in favor of future judicial review challenges seeking more robust climate impact assessment criteria are utilized. Such criteria could include factoring in extraterritorial (or downstream) emissions from foreign exports of fossil fuels and imports of consumer goods. This may ultimately also lead administrative decision-makers to deny GHG-intensive projects (as was seen recently for example in Australia[29]).

[28] http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200207_T-1750-19_reply.pdf

Future Considerations Impacting Climate Litigation in Canada

What future trends could be boiling over for climate litigation in Canada? Both the carbon pricing references and Alberta's reference[30] on Canada's jurisdiction to enact the new *IAA* could potentially be tipping points that embolden future federal government attempts at more aggressive climate mitigation policies. If successful, those more aggressive policies might effectively target and deliver more ambitious GHG reductions that make the target-based challenges or comprehensive inaction-based challenges less politically necessary. However, with a future Conservative federal government a possibility in the near term, and no real climate leadership amongst Conservatives, litigants will likely press forward to get judicially sanctioned GHG reduction target declarations, in spite of progressive policy, to prevent backsliding when governments change, as was seen in Ontario.

Further, in addition to the top-down approach of litigating to change overarching policies such as GHG reduction targets or comprehensively maligning government inaction that has made its way through the courts, and especially if such a first wave of Canadian climate litigation is successful, more specific litigation targeting individual government policies or projects that call climate mitigation implementation into question might crest a second wave of litigation. The continued friction over new energy infrastructure builds such as TMX, Coastal Gas Link, or Keystone XL will likely not abate any time soon. There are approximately 312 ($434 billion in value) oil and gas projects in the federal government's inventory.[31] Further, both the federal government and provincial governments have recently financed controversial pipelines (TMX and Keystone XL) with taxpayer dollars. These political and economic developments could lead to future climate litigation specifically targeting energy project approvals that do not employ robust carbon budget accounting (building on *Pembina* and *Plan B Earth*) and even going as far as to challenge government finance of fossil fuels (what appears to be the first international case challenging subsidies on constitutional grounds – on air travel – was recently launched in Austria[32]). Climate change litigation, much like global warming, does not appear likely to cool down anytime soon, and there will be plenty of legal developments to continue to watch for decades to come.

29 http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWLEC/2019/7.html

30 https://www-thelawyersdaily-ca.ezproxy.library.yorku.ca/articles/15151/alberta-launches-challenge-of-federal-environmental-assessment-legislation

31 https://www.nrcan.gc.ca/science-data/data-analysis/major-projects-inventory/22218

32 http://climatecasechart.com/non-us-case/greenpeace-v-austria/

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COVID-19 AND THE SUSPENSION OF **ROUTINE ENVIRONMENTAL REPORTING IN ALBERTA**

BY **SHAUN FLUKER**

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On March 17, 2020 Alberta declared a public health emergency in relation to the COVID-19 pandemic with Order in Council 80/2020[1] issued under section 52.1 of the *Public Health Act*, RSA 2000, c P-37[2]. During a public health emergency, section 52.1 provides individual ministers with power to suspend the application of legislation which they are responsible for under the *Government Organization Act*, RSA 2000, c G-10[3]. The Minister of Environment and Parks exercised this power in late March with 3 ministerial Orders which defer and suspend certain reporting requirements under the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12[4], the *Water Act*, RSA 2000 c W-3[5], the *Public Lands Act*, RSA 2000, c P-40[6], the *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019[7], and the *Renewable Fuels Standard Regulation*, Alta Reg 29/2010[8], on the basis that these reporting obligations are not in the public interest during the COVID-19 public health emergency. In this comment, I briefly discuss these Orders, what their impact will be on Alberta's environmental regulatory system, and what we might glean from these decisions by the Minister in relation to Alberta's evolving policy commitment to addressing climate change.

In Ministerial Orders 15/2020 and 16/2020, the Minister states that emergency measures being implemented to contain COVID-19 may create challenges for regulated entities to submit compliance reports and emission reduction plan reports under the *Technology Innovation and Emissions Reduction Regulation* and the *Renewable Fuels Standard Regulation*. Accordingly, these Orders defer submission deadlines for 2019 reports under these regulations for 3 months from March 31 to June 30, 2020.

Ministerial Order 17/2020 is distinct in that the Minister suspends, rather than defers, reporting requirements. The Minister has declared there is hardship in complying with routine reporting requirements set out in approvals, registrations, licenses and dispositions issued under environmental legislation during the COVID-19 emergency. Specifically, Ministerial Order 17/2020 suspends the reporting requirements contained in terms and conditions for: approvals or registrations issued under the *Environmental Protection and Enhancement Act*; licenses or approvals issued under the *Water Act*; and dispositions under the *Public Lands Act*. This suspension is in force until at least August 14, 2020, unless the Order is terminated earlier by the Minister or the Lieutenant Governor in Council. The Order does not suspend reporting requirements applicable to drinking water treatment facilities, and moreover, all other requirements (such as a requirement to monitor and collect data which would normally be reported) set out in these approvals et al remain enforceable. It is also important to note here that other environmental reporting requirements, such as those set out in section 110 of the *Environmental Protection and Enhancement Act* with respect to the release of harmful substances, were not affected by this Order. In other words, this Order applies to reporting requirements in the normal course.

Nonetheless, the potential impact of Ministerial Order 17/2020 on the integrity of Alberta's environmental regulatory system should not be underestimated. Industry self-reporting is an

1 http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_080.html

2 http://canlii.ca/t/5449h

3 http://canlii.ca/t/544d6

4 http://canlii.ca/t/544f7

5 http://canlii.ca/t/5330p

6 http://canlii.ca/t/544vx

7 http://canlii.ca/t/543fd

8 http://canlii.ca/t/544f0

essential component of the information gathering, monitoring and compliance functions of a regulatory authority, and also helps to ensure non-compliance events are remedied with compliance measures before these events become regulatory offences with serious human health and environmental impacts. These reporting requirements are standard fare in approvals issued under Alberta's resources and environmental legislation, often connected to threshold requirements. In the context of a water licence, for example, a licence holder may be required to monitor and report on the flow rate of a source stream so that Alberta Environment can monitor for compliance on thresholds which trigger prohibitions on diversion, or so that Alberta Environment can simply gather data on the longer term impacts of an activity on the ecological integrity of the stream. While it may be that an approval holder will continue to meet reporting requirements, despite the suspension implemented by Order 17/2020, the very reason for a mandatory requirement is because voluntary compliance cannot be relied upon. Under the terms of Order 17/2020 it is not clear whether suspended reports will ever be submitted to regulatory authorities. The Order states that information collected in relation to reporting requirements during the suspension period must be made available to regulatory authorities upon request.

It is surprising that Ministerial Order 017/2020 does not require approval holders to substantiate a causal connection between hardship in reporting and COVID-19. As an interesting contrast in regulatory approach, the Alberta Securities Commission has provided relief on reporting requirements in the financial market (see e.g. Temporary Exemption from Certain Corporate Finance Requirements, 2020 ABASC 33[9] and Relief from Reporting Requirements for Regulated Entities Carrying on Business in the Province of Alberta, 2020 ABASC 34[10]), but has attempted to mitigate the impact of this relief on the integrity of securities regulation by imposing conditions including, in some instances, a requirement to substantiate why compliance with the normal requirement wasn't achievable.

From a climate change perspective, the deferral of reporting under the *Technology Innovation and Emissions Reduction Regulation* and the *Renewable Fuels Standard Regulation* is unlikely to be of any real significance and it is encouraging that these reports are still required to be submitted to regulatory authorities, albeit at a later date. It is more difficult to assess the impact of Ministerial Order 17/2020 on Alberta's climate change policy. There is little doubt that reporting requirements contained in terms and conditions for some approvals issued under the *Environmental Protection and Enhancement Act* relate to information relevant for monitoring on factors which contribute to climate change as well as for monitoring the effects of climate change on Alberta's air, land and waters. However, the Order itself provides no assessment of these impacts at even the most basic or general level, the impact of suspended reporting will depend on the overall duration of the suspension which is still uncertain, and a thorough assessment of impact would require a review of the terms contained in thousands of individual approvals.

COVID-19 has provided us with a rare opportunity to observe the exercise of emergency law-making powers in Canada, and in particular, the exercise of legislative powers by the executive. From the perspective of Alberta's policy commitment to address climate change, perhaps the most troubling aspect of Ministerial Order 17/2020 is not even the suspension of routine reporting requirements but, rather, how the Minister of Environment and Parks exercised this unilateral emergency power. Section 52.1 of the *Public Health Act* gives individual ministers extensive power to legislate without scrutiny by the legislative assembly and apart from even the minimalist accountability that would be provided by the *Regulations Act*, RSA 2000 c R-14. Released from the constraints of these accountability measures, the Minister acted swiftly to grant a blanket suspension to environmental reporting requirements and, in doing so, showed no apparent regard for the ability of the environmental regulatory regime to serve its policy objectives. Looking ahead, this sort of executive decision-making by a Minister responsible for climate change policy is not an encouraging sign for climate measures that rely on an effective and enforceable regulatory system.

Photo: "Free Dusty Road to the Horizon" by Lonnie Taylor from FreeImages.com (https://www.freeimages.com/photographer/patgroove-34119)

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[9] https://albertasecurities.com/Securities-Law-and-Policy/-/media/A69871B0802640AEA70D8621484DF850.ashx

[10] https://albertasecurities.com/Securities-Law-and-Policy/-/media/F25952C66B97436FAD66225FBB864976.ashx

UNSUNG HERO: **RANI WONG**

BY **SUSANNAH ALLEYNE**

Rani Wong has dedicated her practice to Family Law and Wills and Estates; however, she began her 20-plus-year career practicing as a corporate commercial lawyer. Rani has practiced with some of Canada's top tier national law firms in Vancouver, Toronto and Calgary. She is the current president of the Association of Women Lawyers (AWL) and previously chaired the AWL Membership committee and Mentorship committee for many years. Rani also lends her time to volunteering in various roles with the CBA, such as co-chairing the Equality, Diversity & Inclusion Committee and she remains an active member of the Federation of Asian Canadian Lawyers (FACL). As an experienced lawyer with a booming practice and as an active volunteer within the profession, Rani is an invaluable member of the Alberta legal community and an unsung hero who is doing her part to make sure that the legal profession represents those that we serve.

RANI **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.

This question is the ultimate challenge in summarizing: What do you do and why do you do it?

I am a family law lawyer and I volunteer a lot of time with organizations that promote values that I am passionate about and believe in.

Why do I practice family law? Well, I started my career as a corporate commercial lawyer and I practiced in that area of law for 14 years before starting my career in family law. The reason that I made this career change was in pursuit of more meaningful and personally satisfying work. In my current practice I am helping families resolve their legal issues which directly impacts not only my clients, but also their children and it is my hope that the impact is always for a more positive outcome and path forward. In doing this work, I have found the personal satisfaction that led me to this area of law in the first place.

With respect to my volunteer work, I have been on the board of the Association of Women Lawyers for over 12 years. I have also been a member of the Canadian Bar Association for many years and volunteered with various committees, sections, provincial council and the Legal Futures Initiative. In recent years my volunteer work has been around diversity and inclusion. Why do I do this work? It's about giving back to the community and helping others overcome challenges and issues, some of which I have personally faced throughout my career.

I also paddle and race with the Sistership Dragon Boat Association for breast cancer survivors. These incredible, courageous woman paddlers have supported me and taught me how to thrive as a survivor and I intend on doing the same for new survivors.

Much of your volunteer work is around empowering women, with some of it focusing on women of colour. How did this develop?

This developed out of my personal experiences and challenges that I've faced in life generally, and more specifically in the legal profession. From the moment I began my legal career as a summer student in a law firm in the mid 1990's and again during articles, I feel like I faced considerable challenges as a woman and as a visible minority. I'm not sure I even recognized them at the time, but these challenges included sexual harassment, gender and racial discrimination and cultural misunderstanding. For example, I was raised in a culture where it is not appropriate to be openly aggressive, assertive or question authority – however, these are often qualities that are seen as admirable, and mandatory even, in our profession. Looking back and recognizing what I faced, I wanted to turn around and help others in similar situations by supporting them and helping push them forward and upwards.

I appreciate your courage in sharing your personal experiences. How would you say you overcame those challenges that you faced in the workplace?

I think that particularly in the Big Law environment, and especially "back in those days", hard work was how I rose above the adversity I faced. I feel like I had to work harder than my contemporaries, particularly my white, male colleagues, to try to fit in and to find mentors and champions that would facilitate good work opportunities and offer you the training that you needed. I made a lot of personal compromises to "try to be like everyone else" so that I was trusted with the work

that I needed to be able to build my career.

Having faced the challenges you have shared, and worked hard to overcome them, what would you say diversity means to you?

In the legal profession, to me it means having lawyers from diverse backgrounds — whether you're looking at race, religion, gender, sexual orientation, different abilities, age, socioeconomic status and other identifying factors — in the profession. It is also having these diverse lawyers feel that they are respected, included and given equal opportunities to succeed.

Why do you think everyone is talking about diversity these days? Is all this chatter good? Bad? Both?

People have been talking about diversity for a long time. The Law Society of Alberta commissioned a study in 2004 on diversity in the profession and in Ontario studies and discussions have been taking place for even longer periods of time. These days, I think there is more discussion because there is more awareness. I think there's a forward momentum, as we've reached a critical mass of people who are aware of these issues and want to push the conversations around diversity forward into further action. I think all the chatter is good. The profession and society as a whole, benefits from not only more discussion about diversity but people taking action and implementing policies around diversity and ensuring that lawyers and law students feel included and respected.

What are some of the most promising changes you are seeing in the profession today? Why do these changes give you hope?

In the past year or two, some of the most promising changes I see include the Law Society and other organizations hosting training sessions and seminars on recognizing and challenging unconscious bias and respecting cultural differences. I also see that almost all of the large law firms have developed or adopted policies on diversity and inclusion and are working on implementation in a practical way. When you look around today, you are seeing more and more diversity at the bar and on the bench and tha definitely gives me hope. These changes and the continuing discussions around these issues were not happening on the same scale 20 years ago. I'm also encouraged when I see large corporations, particularly multinational corporations who I think were way ahead of us in this regard, not only adopting diversity and inclusion policies but implementing them by demanding that their legal service providers adopt similar policies and practices.

What are some of the gaps with respect to diversity that you think the profession needs to work harder at closing? What are your thoughts on how we tackle these persisting issues?

The existing wage gaps between genders and then among different groups of racialized minorities need to be closed. The principle of equal pay for the same work is fundamental to the success of our profession.

I'm also concerned about the experience of diverse lawyers in the legal profession and measuring this is sort of an attempt to measure the intangible, but I want to know, are these lawyers feeling valued and respected in the workplace? Are they sought out for their opinions, perspectives and the solutions they might bring to the table?

And of course, there's a gap in the profession reflecting the communities we serve. Statistically, law school students, lawyers at the bar and the bench do not mirror the diversity in our society.

How do we tackle all of this — we need to keep up the good work we have been doing and continue to offer training to our members and increase their awareness around the issues facing diverse lawyers. For example, the Law Society in conjunction with the CBA Equality, Diversity and Inclusion committee that I co-chair did just release model policies about respect in the workplace; and, this past November the CBA Equality, Diversity and Inclusion committee partnered with the University of Calgary Law School and a group of high school student leaders to organize the Youth Leaders in Law conference where high school students were encouraged to consider careers in law and had the opportunity to hear from members of the bar and the bench about our profession. I think projects and collaborations like these need to continue and occur more frequently in order to close the gaps that still exist around diversity and inclusion in our profession.

What would you say to some of the diverse lawyers who are newer to the bar and who may feel disenfranchised, or who are struggling with challenges around equality and inclusion today?

In short, hang in there! I would encourage them to find mentors and champions who will advocate for them and, when they can, to speak up and support their peers facing similar challenges. Join professional organizations that are working to provide encouragement and advocacy for them such as AWL, FACL and CABL and build a strong network of support to help you face these challenges.

Where do you see the conversations around diversity taking us in the future?

Well, that's a difficult question. I want to say that conversations are good and they should continue; but, from my perspective enough studies have been done, we've had enough conversation around the recommended actions we need to be taking as a profession. These conversations have to take us to a stage and time where the legal profession reflects our diverse society, so that's where I'd like to see the discussions take us. More of us have to commit to take action and train ourselves to recognize and be aware of diversity and bias issues in all aspects of the workplace environment including hiring, training and compensation decisions. That's what I'd like to see. That's the profession I want to be a part of in the future.

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.

SUSANNAH ALLEYNE is an associate at Matkovic Allan LLP, where she practices primarily in the area of family law. Susannah sits on multiple CBA committees, and also volunteers with the Association of Women Lawyers, Calgary Legal Guidance and with various associations in Calgary's Caribbean community.

NEW YORK V EXXON: **A RECENT CHAPTER IN CLIMATE CHANGE LITIGATION**

BY **MATTHEW M. HUYS** AND **DANIEL A. DOWNIE**

It has been four months since the New York Attorney General's (NYAG) headline-grabbing climate change suit against ExxonMobil (Exxon) was dismissed. The decision followed a multi-year investigation by the NYAG into Exxon's climate change-related disclosure.

The NYAG had alleged that Exxon misrepresented the cost of future climate change regulations to investors. Justice Ostrager of the New York Supreme Court, referring to the NYAG's claims as "hyperbolic," found that Exxon's climate change disclosure had not misled investors.

As the first climate change-related disclosure trial, Exxon's resounding victory is significant. However, the decision will not be the last chapter in litigation relating to oil and gas producers' climate change disclosure — the Attorney General of Massachusetts' (MAG) similar claim against Exxon is ongoing and future cases will likely arise.

History

The NYAG began its investigation into Exxon on November 4, 2015. The investigation was launched after years of lobbying by the #Exxonknew campaign. That campaign alleges that Exxon: (i) has known about the link between Greenhouse Gas (GHG) emissions and climate change since the 1970s; and (ii) since that time, misrepresented its research and climate change disclosure to the public. Like the #Exxonknew campaign, the NYAG's investigation was originally predicated on claims that Exxon failed to disclose research about the impacts of GHG emissions on climate change.

In June 2017, the investigation changed course to investigate whether Exxon misrepresented to investors the risk of climate change to its business. The NYAG's investigation into Exxon's operations was far-reaching and required Exxon to produce over three million documents, much of which was not publicly available.

After nearly three years, the NYAG concluded its investigation and brought a securities fraud suit against Exxon under the state's *Martin Act* (NY Gen Bus Law, Art 23-A).

The Allegations

Since the mid-2000s, Exxon has forecasted the impact of increased GHG regulations on the demand for oil and gas and how increased GHG regulations might affect the feasibility of future Exxon projects.

The NYAG claimed that Exxon made three material misrepresentations in reports published in 2014 which outlined that Exxon used proxy costs for carbon emissions to account for anticipated increased GHG regulations when assessing oil and gas demand and evaluating potential projects. These proxy costs were estimates for 2030 and 2040. The NYAG alleged that: (i) Exxon's internal undisclosed guidance authorized applying a lower proxy cost than represented to the public; (ii) Exxon did not apply proxy costs to projects in developing countries; and (iii) Exxon applied lower proxy costs than it represented, or none at all, in parts of its business in developed countries, including the Alberta oil sands, instead applying a proxy cost based on then-current regulations.

The claims were brought pursuant to the *Martin Act*, which requires that the NYAG prove, based on a preponderance of the evidence, a "misrepresentation of material facts" that would have "actual significance in the deliberations of the reasonable shareholder."

The Decision

The NYAG's claim failed. The Supreme Court made it clear at the outset that this action was not a platform for the NYAG to address climate change, writing that "this is a securities fraud case, not a climate change case." The question was not whether climate change is happening or who is responsible, but whether Exxon made material misrepresentations that could have misled investors.

The Supreme Court was not persuaded that the proxy costs in 2030 and 2040 could have materially affected investor decisions in the 2013-2016 period. The proxy costs were at best an educated guess as to the economic effect of GHG regulations in the distant future. The witnesses put forward by the NYAG to support the assertion that the alleged misrepresentations were material were in the words of the Supreme Court "eviscerated" on cross-examination and by the Exxon expert witnesses. Further, the NYAG failed to produce any testimony from investors claiming to have been misled by Exxon. The Supreme Court found that, based on the preponderance of the evidence, Exxon had not made any misrepresentations of material facts that would significantly impact the deliberations of a reasonable shareholder.

Looking Ahead

In January 2020, the NYAG said it will not appeal the Supreme Court's decision. As such, this years-long battle between Exxon and the NYAG has ended.

While this case was a categorical victory for Exxon, Exxon remains named as a defendant in more than a dozen active climate-change cases. Notably, the MAG's claim against Exxon is ongoing. A trial date has not been set. That case resembles the NYAG's case in some respects but relies on Massachusetts' state laws and a broader ambit of accusations concerning fraud and advertising. As such, it is unclear if the New York Supreme Court's decision is indicative of the MAG's prospects of success. Regardless, what is clear is that the New York Supreme Court's decision was the first chapter, but not the last, in climate change-related disclosure litigation.

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ALBERTA COURT OF APPEAL MAKES BOLD CHANGES TO CONSTITUTIONAL LAW DOCTRINE IN THE **GREENHOUSE GAS POLLUTION PRICING ACT REFERENCE**

BY **RICKI-LEE GERBRANDT**

In the recent *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 ("GGPPA Reference") on the federal *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*"), the majority of the Court of Appeal (Fraser CJ, Hughes and Watson JJA) assured its readers that it was not wading into the myriad of political issues evoked by the reference. Instead, they were asked only to opine on whether the federal government has the constitutional jurisdiction to enact the *GGPPA*. The Court's significant departure from existing constitutional law doctrine may to some readers render those assertions less convincing. They do, however, provide for a fascinating read.

The majority found the *GGPPA* wholly unconstitutional, in a treatise of a judgment explaining why the federal government is without any authority to legislate in regard to "GHG emissions"—even holding that the federal government's attempt to do so was "constitutional chutzpah". Wakeling JA's concurring opinion was replete with hypothetical analogies of British Columbia pine beetles threatening Alberta and a meteor explosion over Northern Quebec (both examples purporting to explain when the federal government can't validly enact legislation). The lone dissent of Feehan JA found the *GGPPA* constitutional.

The SCC was set to hear the Reference question in early March 2020 from the judgments of the Ontario and Saskatchewan Courts of Appeal, where the majority in both courts found the *GGPPA* constitutional. As that hearing was sidelined as a result of the coronavirus pandemic, the Alberta Court of Appeal decision may yet directly end up before the SCC on appeal.

What the *GGPPA* Does

The *GGPPA* provides for minimum standards of price stringency for certain items producing GHG emissions. It would only apply if a provincial law did not meet these minimum standards. If a provincial law did not meet these minimum standards, the *GGPPA* would apply in that province. The *GGPPA*'s aim is to alter the behaviour of Canadians and enterprises to produce less GHG emissions, invest in cleaner technology, or pay to keep producing GHG emissions. The hope is that this will help Canada lower its cumulative GHG emissions, allow Canada to perform international climate change treaty obligations, and thereby help ameliorate global climate change.

National Concern Doctrine and Characterization of the Law

For the federal government to have the constitutional jurisdiction to enact such a law, it would have to fall under the "peace, order and good governance" clause ("POGG") in section 91 of the *Constitution Act*, which confers on Parliament the power: "... to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces...".

There are three branches of POGG: (i) the gap (residual) branch, (ii) the emergency branch, and (iii) the national concern branch. The federal government in the *GGPPA* Reference argued that the national concern branch of POGG permitted it to enact the *GGPPA*. For a matter to qualify, the SCC in *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 held that a matter of national concern must:

- have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern"; and
- a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".
- In the same case the SCC recognized the relevance of "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter".

This test has led to significant disagreement across the three Courts of Appeal that have assessed the constitutionality of the *GGPPA* as to the proper "characterization of the law".

To determine whether a government has the constitutional jurisdiction to enact the challenged legislation, the court: first assesses the pith and substance of the law (by looking at the purpose and effect of the challenged legislation) to characterize the "matter"; and second, it "classifies" the "matter" under the jurisdiction of either the provincial or federal government. How the matter is characterized drives its classification; in a sense everything turns on characterization.

Although the federal government sought a narrow characterization of the *GGPPA* ("the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions"), which would in turn narrowly confine federal jurisdiction to legislate in regard to that subject matter, the majority found that the Act was not narrowly confined, but broadly encompassed the regulation of "GHG emissions". As such, the *GGPPA* could not be classified under the POGG power because it did not have the requisite "singleness, distinctiveness, or indivisibility" or "scale of impact" on provincial jurisdiction that can be reconciled with the division of powers in the Constitution.

Significant Changes to Constitutional Law Doctrine

The reasons for the majority suggest a bold change to the national concern doctrine—and it will be interesting to see if the SCC chooses to tackle it.

Prior to analyzing the national concern test as set out in *Crown Zellerbach*, the majority adds a gatekeeper step to the national concern doctrine. Before the national concern test can even be engaged, the province must have no jurisdiction over the "matter" of the impugned Act (here, "GHG emissions") under

any provincial head of power except for section 92(16) which is "Matters of a merely local or private nature in the Province". The rationale for this change, according to the majority, is that only matters of a merely local nature could be transformed into matters of a national concern—the other specified heads of provincial power can never be. The majority reasoned that if the Fathers of Confederation wanted the federal government to have jurisdiction over provincial matters that subsequently became of national concern then they would have said so. (What the majority failed to deal with convincingly was the jurisprudence that has already rejected this view. And if the Fathers of Confederation wanted POGG to apply only if matters fell within section 92(16) and no other, they could have said so too.)

At its heart, the majority's point is this: the POGG head of jurisdiction, and the national concern doctrine in particular, cannot be wantonly expanded so as to oust provincial jurisdiction — otherwise the division of powers in Canadian constitutional democracy collapses. What the majority did not address is the reality that section 92(16) has rarely been used as the sole basis for provincial power in constitutional jurisprudence — because most matters fall within a more obvious provincial head of power. It is therefore questionable whether anything of substance could fall purely within section 92(16) but no other provincial power, severely restricting federal jurisdiction over a matter pursuant to the national concern doctrine. Perhaps this was the majority's (unstated) point?

Wakeling JA's concurring opinion also makes a bold change to the basic constitutional test. He abandons the "pith and substance" language, calling it unfortunate, archaic wording that constitutional lawyers are wont to use (which may be an apt conclusion: "pith and substance" does have a delightfully esoteric ring) but doesn't address the fact that the "pith and substance" test has been the fundamental constitutional test for characterizing a law for over a century. He instead asks whether the impugned law "displays features" of a law that justify its classification to provincial and federal jurisdiction and compares the "importance of the interests" of the aspects of the law (unless jurisprudence has already undertaken that task and resolved the conflict). This is a novel alteration of the fundamental characterization and classification test.

Feehan JA was the only justice to find the *GGPPA* constitutional. The straightforward modesty of his approach simply underscores how much of a departure from orthodoxy the majority made. He applied the straight-forward pith and substance characterization test, and the national concern doctrine as it has been developed in prior jurisprudence. With that said, he provides little analysis of the effects of the *GGPPA* (failing to consider whether the extrinsic and intrinsic evidence suggests it impedes provincial jurisdiction). The SCC will not be able to avoid this issue and will have to tackle it head on.

Going Forward

How the SCC deals with the majority's new proposal to change the test, and how it will structure the national concern doctrine going forward will, potentially, be pioneering since there is little jurisprudence concerning the national concern doctrine as it is. And as the world continues to become even more interconnected and various collective action problems arise, it is likely that more of these division of powers issues will appear as new concerns threaten not just a single province or the nation, but the entire world.

The author is indebted to the research assistance of Isabelle Lam. The opinion and any errors remain with the author.

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PUBLIC DISCLOSURE OF **CLIMATE CHANGE-RELATED RISKS**

BY **DAVID TUPPER, JEFF BAKKER, BRENDAN MACARTHUR-STEVENS** AND **PETER MOORMAN**

Along with the economic, social, and political environment in which it operates, the Canadian law related to climate change is evolving rapidly. Laws and stakeholder expectations about the public disclosure of climate change-related risks is no exception. This article summarizes recent developments in this area that are relevant to Canadian public issuers.

Disclosure of climate change-related risks differs from many other forms of public disclosure. This is because of the uncertainty about the effects of such risks, and, in many cases, the length of time those effects take to materialize. As society's focus on climate change has grown in recent years, stakeholders, major institutional investors, and governance entities are increasingly demanding more robust and specific climate change-related risk disclosure to inform their business decisions.

In Canada, climate change-related risk disclosure is informed by both international and Canadian entities.

At the international level, two of the major driving influences on climate change-related risk disclosure standards are the Taskforce on Climate-Related Financial Disclosure ("TCFD") and the Sustainability Accounting Standards Board framework (the "SASB Framework"). The TCFD has provided a common international disclosure framework using four widely adoptable recommendations about climate-related financial disclosures. The SASB Framework assists in identifying the information needed by investors, lenders, and insurance underwriters to appropriately assess and price climate-related risks and opportunities. The SASB Framework also offers industry-specific analysis of existing climate-risk disclosure. Moreover, its standardized disclosure framework aligns with the initiatives of both the Securities Exchange Commission and the Financial Stability Board.

Turning to Canada specifically, on August 1, 2019, the Canadian Securities Administrators ("CSA") released Staff Notice 51-358 – *Reporting of Climate Change-related Risks* (the "2019 Notice") in response to increased investor interest in climate change-related risk disclosure. The 2019 Notice acknowledges that there is significant room for improvement in climate change-related risk disclosure and seeks to provide uniform disclosure standards. The 2019 Notice does not create additional disclosure standards. Rather, the 2019 Notice expands on the guidance provided in CSA Staff Notice 51-333 – *Environmental Reporting Guidance*, which was published by the CSA in October of 2017. That earlier notice provided guidance to issuers about existing continuous disclosure requirements relating to a broad range of environmental matters, including climate change.

The 2019 Notice provides specific guidance about how issuers should frame climate change-related risk disclosure in their Annual Information Form and Management Discussion & Analysis. The disclosure should avoid vague or boilerplate language, and instead provide relevant, clear, understandable, and entity-specific information that allows investors to understand how the specific issuer's business is affected by climate change risks. The 2019 Notice states that a climate change-related risk should be disclosed if it is likely to affect a reasonable investor's decision to buy or sell securities of an issuer where the information in question was omitted or misstated. This materiality threshold is important in climate change related-risk disclosure, as issuers should consider whether material risks should be included regardless of whether they are expected to crystalize in the near-, medium- or long-term.

In terms of specific disclosure guidance, the 2019 Notice indicates that climate change-related risk disclosure should generally address physical and transitional risks in both the short- and long-term:

- Physical risks include risks that result from climate change that are event driven. These include increased severity of extreme weather events, such as cyclones, hurricanes, or floods, or longer-term shifts in climate patterns, such as sustained higher temperatures, if those events have direct financial implications for an issuer. Those financial implications may include direct damage to assets and indirect effects resulting from supply chain disruption; and

- Transitional risks are less direct than physical risks. Transitional risks include reputational, market, regulatory, policy, legal, and technology-related risks, which may arise as a result of a transition to a lower-carbon economy in response to climate change.

Despite the enhanced guidance provided by the TCFD, the SASB Framework, and the 2019 Notice, the precise legal requirements of disclosure of climate change-related risks remains relatively vague and subjective, as compared to other disclosure requirements. Securities issuers should consider these issues carefully and stay informed in this area to ensure that their public disclosure aligns with the most up-to-date corporate guidance and stakeholder expectations.

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POINT: LAWYERS HAVE A ROLE TO PLAY IN RESPONDING TO CLIMATE CHANGE

BY **MEREDITH JAMES**

At the Canadian Bar Association (CBA) 2020 annual general meeting (AGM), I put forward a climate leadership motion developed with colleagues from across Canada and supported by the Aboriginal Law Section, Labour and Employment Law Section, Municipal Law Section and Women Lawyers Forum. Although the motion did not pass, the CBA Board of Directors decided to nullify the vote and to re-table the resolution at the next AGM because of technical difficulties with the voting process.

The debate regarding this motion at the AGM made clear that we could do more to explain why we believe that responding to climate change raises issues of justice and equality, and why lawyers from many practice areas have a role to play in responding to the impacts of a changing climate and developing solutions to speed our transition to a less carbon-intensive society. I welcome the opportunity to have that discussion here and in the leadup to the next AGM.

No debate regarding the science of climate change

The CBA has already recognized that climate change, and Canada's response to it, have profound environmental and economic implications for Canada's future. In a 2011 resolution, the CBA urged the federal, provincial and territorial governments to take immediate action to work together to develop and implement comprehensive national climate regulations that include mandatory greenhouse gas emission reductions and carbon pricing.[1] In 2016, Canada ratified the Paris Agreement and joined the global consensus that we must hold the increase in global average temperature to well below 2°C above pre-industrial levels, and pursue efforts to limit the increase to 1.5°C, in order to avoid the worst impacts of climate change.[2] Although I understand my friend Mr. Major takes issue with the mechanics of the Paris Agreement, he has not disagreed that the temperature targets are valid.

Other bar associations are already acting

In 2012, the International Bar Association (IBA) created the Climate Change Justice and Human Rights Task Force. Its objective was to support the IBA in assessing the challenges to national and international legal regimes on climate change, with a focus on justice implications and deficiencies, and to make recommendations accordingly.[3] The outcome was their 2014 report, Achieving Justice and Human Rights in an Era of Climate Disruption. The broad scope of the Task Force's work — which included environmental law, human rights law, trade law (including investment law), and international law (including territorial sovereignty, health, food and environmental security, immigration, and intellectual property) — illustrates the breadth of the legal implications of climate change. The Task Force's conclusion that: "Existing legal mechanisms addressing mitigation, adaptation and remediation of climate change are failing to cope with the scale of the global issue and its wide-ranging impact on individuals" is a call for lawyers to consider how we can enhance our legal regimes to respond to the challenges of climate change.

In 2019, the American Bar Association (ABA) passed a resolution calling on all levels of government to take actions to reduce emissions to net zero as soon as possible, similar to the CBA's 2011 resolution.[4] The ABA then goes a step further and "urges lawyers to engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change, and to advise their clients of the risks and opportunities that climate change provides."

Lawyers around the world are actively searching for ways to engage with their profession on the issue of climate change. British lawyers are urging their Law Society to take a leadership role by informing lawyers of legal implications of climate change and finding appropriate remedies.[5] Australian lawyers

Photo: Earth at night (iStock.com/ ipopba)

1 Canadian Bar Association Resolution 11-05-A, *Climate Change* (August 13-14, 2011) online: http://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2011/Changement-climatique/11-05-A.pdf.

2 *Paris Agreement* (2015) online: https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

3 International Bar Association, Climate Change Justice and Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruptions* (2014) online: https://www.ibanet.org/PresidentialTaskForceClimateJustice2014Report.aspx at p. 2 [IBA Report].

4 American Bar Association Resolution 111 (August 12-13, 2019) online: https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/111-annual-2019.pdf [ABA Resolution].

are calling on their Law Council to declare a climate emergency and take action to address it.[6]

Necessary transitions will require legal support from many practice areas

Limiting global warming to 1.5°C will require rapid and far reaching transitions in land, energy, industry, buildings, transport, and cities.[7] Lawyers are uniquely positioned to identify new tools to assist in that transition and have already identified hundreds of possible legal tools to achieve net zero emissions by 2050.[8] These tools are not just the usual suspects related to reducing emissions (regulation, emissions trading, etc.) but also include a broad suite of tools to support building a low carbon economy. Lawyers in many areas of practice will have a role to play in developing these tools. Expertise in finance, corporate law, municipal law, procurement, contract law, real estate and many other areas will all be critical.

The intention of the proposed climate leadership resolution is to encourage and support lawyers to proactively develop these legal tools. Unlike my friend, I see the COVID-19 pandemic as an example of the importance of being prepared. In contrast to an unexpected pandemic, we have received ample warning that the impacts of climate change will be widespread and severe, and we have the opportunity as a profession to consider how we will respond.

Law reform should be informed by fairness and respect for human and Indigenous rights

The impacts of climate change undermine human rights and create injustices. Our response to climate change also risks further injustice if it is not informed by human rights and Indigenous rights. "Climate justice as a concept allows us to view climate change and efforts to combat it as having ethical implications, and to consider how these issues relate to wider justice concerns… climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups."[9] The definition of climate justice in the proposed climate leadership resolution is drawn from the IBA Task Force report with a modification to explicitly recognize Indigenous rights.[10]

Climate leadership resolution calls for engagement not a prescriptive outcome

The climate leadership resolution requests that CBA Branches, Sections, Committees and Subcommittees consider climate justice and the impacts of climate change in their submissions regarding potential law reform and in developing educational programming. How these entities respond to this request, and what they conclude, will be up to them.

Following the ABA's lead, the climate leadership resolution also urges lawyers to: engage in pro bono activities activities to reduce greenhouse gas emissions, adapt to climate change, and advocate for climate justice; advise their clients of the risks and opportunities associated with climate change; and make efforts to reduce the greenhouse gas emissions associated with their practice in keeping with available resources and geographic location. Individual responses to this call will be at each lawyer's discretion.

We will not find solutions by rehashing old arguments regarding the false dichotomy of economy vs. environment. We must think creatively, be proactive, and engage the expertise of our entire profession, first, to understand what climate disruption means for our practice areas and, second, to review our legal regimes for opportunities to respond and adapt in ways that reflect our shared commitment to justice and equality.

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5 Jonathan Goldsmith, "Lawyers' role in climate change" *The Law Society Gazette* (11 November 2019) online: https://www.lawgazette.co.uk/commentary-and-opinion/lawyers-role-in-climate-change/5102138.article.

6 Environmental Justice Australia, "We've joined the call for the legal profession to respond to the climate crisis" (2020) online: https://www.envirojustice.org.au/projects/weve-joined-the-call-for-the-legal-profession-to-respond-to-the-climate-crisis/.

7 Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C, an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018) online: https://www.ipcc.ch/sr15/.

8 ABA Resolution at p. 14, citing *Legal pathways to deep decarbonization in the United States* (Michael B. Gerrard and John C. Dernbach eds. 2019).

9 IBA Report at p. 46.

10 IBA Report at p. 35.

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COUNTERPOINT: **THE CASE AGAINST THE PROPOSED CBA RESOLUTION FOR "CLIMATE JUSTICE"**

BY **STEVE MAJOR**

A "Climate Justice" resolution was recently proposed to the Canadian Bar Association at its Annual General Meeting (the "Resolution"). I oppose this and was invited to elaborate as to my reasons why.

I have two children and am concerned about the health of our one, and only, planet. However, and I say this respectfully, if ever a resolution was ill-timed, it is this one. Not only was it wrong to propose it before the COVID-19 outbreak; it is absolutely tone-deaf now.

What does "Climate Justice" mean? Ask ten lawyers this question, and you will probably get ten different answers. The proponents have expressed their lengthy definition of it below, the components of which could also be defined in a multitude of ways:

> To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights and Indigenous rights.
>
> *[Emphasis added.]*

Indeed, the meaning and interpretation of every single word of this definition is debatable, if not controversial (I have underlined those which would be most obvious to me). Alas, since I have a word limit for this piece, I cannot delve into all these potential meanings. Nor, in my view, should the CBA.

To certain lawyers, "Climate Justice" may really mean "leaving all fossil fuels in the ground" and interpreting any pro-energy development as something against which to rally, legislate, rule, and if the Resolution passes, then also enlisting the CBA to advocate such an agenda.

To others, "Climate Justice" actually means something at the opposite end of the spectrum, that is doing everything possible to facilitate getting Canadian oil and natural gas to the rest of Canada and specifically, to tidewater in order to ultimately replace the (higher emission) coal-burning in China. After all, global CO2 emissions know no border.

It is not my purpose here to extensively debate the merits of the *Paris Accord* (mentioned in the Resolution's preambles). Suffice to say, the Paris Accord has numerous critics, many of whom also agree with the eventual de-carbonization of our atmosphere. One drawback is that numerous carbon-emitting countries are not part of it (either refusing to ratify like Iran or withdrawing from it like the U.S.), and yet we all share the globe's atmosphere. Another flaw is that it only counts emissions produced, but not consumed, in a country. This incentivizes a phenomenon known as "carbon leakage" where any emission reductions made by reducing local outputs are simply replaced (or exceeded) globally, as other countries then increase their outputs to meet the demand with no change in consumption. Perversely, this means if we stop producing in Canada and buy everything from China, (whose exported outputs would then be exempt from the Canadian calculations), we would meet our country's climate goals, even though this would likely cause greater global climate damage. How is that a good thing? Canadians ought to be encouraging fairer-minded solutions to global emissions, rather than being beholden to the *Paris Accord*, which rewards the shifting of emissions.

My main point is this: the subject area of climate is complicated, nuanced, and political. The CBA is supposed to speak for all of its members, and a single definition of "Climate Justice" simply cannot capture all of its members' perspectives in respect of this challenging issue. Nor should it try. If justice is supposed to be blind, then we should not be trying to politicize the law. Yet, the Resolution proposes to do just that.

I confess much of my motivation to oppose the Resolution is based on the assumption that, after years of damage created by the largely foreign-funded environmental movement, the term "Climate Justice" really just means "Kill Canadian Oil and Gas". Let me be transparent: my opposition is also motivated by my wish to defend Canadian Energy from yet another attack, this time from our very own law industry association, the CBA. Let's revisit the discussion *before* the COVID 19 pandemic (which now seems like eons ago):

- We are globally facing the "7 to 9 challenge" — referring to the expected growth in billions of the planet's population over the next 30 years who will also be desperate to escape poverty and enjoy the standard of living of developed nations, all of which points to an increasing energy demand. No reputable source counters this prediction. I argue that the last energy molecule ought to be supplied by Canada.

- While it is a worthy goal to reduce GHG emissions and whatever man-made climate change these cause, it is imperative to have a functioning economy while also protecting the environment. The two cannot be mutually exclusive (it seems the Resolution's proponents and I may actually agree on this); the COVID 19 pandemic proves this to be the case.

- While it would be wonderful if all of our energy supply was immediately renewable and we could boast of zero (or even negative) net emissions, the full transition to solar, wind, tidal, thermal, hydro, and nuclear energy will realistically take decades and must be funded in the interim by an incentivized oil and gas industry. Some previously-lauded alternatives may now also be losing some of their luster, such as biomass production with its related deforestation and solar power requiring quartz-mining for panels.

- Canadian energy companies have already been the ones leading the innovation charge towards net zero emissions, which is the goal most believe to be desirable while still maintaining a robust economy that allows us to pay the bills and survive. Canadian Natural Resources Ltd., Cenovus, Shell Canada and MEG Energy, to name a few, have been investing substantial funds into research and development towards things like carbon-capture technologies in the extraction process and "BBC" (Beyond Bitumen Combustion). BBC would allow the capture and conversion of asphaltene that makes bitumen heavy into carbon fibre, thereby ultimately reducing emissions per barrel and replacing steel for greater longevity across a wider range of products, all of which is good for the global carbon footprint. This could be our global "game-changer", making the world a better place while simultaneously generating wealth for, and improving the lives of, Canadians. [The more detailed explanation of this exciting new BBC technology is an easy read: https://www.dailyoilbulletin.com/article/2020/3/2/carbon-fibre-from-bitumen-offers-emissions-benefit/.]

- Moving capital away from Canadian energy companies, for example through divesture of the endowment funds of various universities or depriving them of government recovery and assistance, makes their cost of obtaining money higher (re: higher interest charges), and thereby causes a disincentive to pursue these new innovative avenues when they must take the knife to the bottom-line for their shareholders. Endowment divesture and economic deprivation would consequently only hinder, not help, Canada and the planet achieving lower GHG emissions.

- Canadian energy companies are also leading the charge on Indigenous partnering (as true equity partners), such as Canadian Utilities partnering with seven Indigenous Nations in December 2019 for co-ownership of the massive Alberta Power Line, with the result that Indigenous Nations now own 40% of that project. It is the projected return from these partnerships, and not government subsidies, which are going to help Indigenous Peoples finally escape poverty (and its related ills) and truly lead to the nation's goal of Reconciliation. The fact is the majority of Indigenous Peoples and their leaders (both elected *and* hereditary) want Canadian energy development, as well as the opportunities it provides to their communities. Just ask Stephen Buffalo, who has become a beacon of the pro-energy Indigenous movement. The best way to empower Indigenous communities is for them to be real partners in exporting Canadian energy to the planet.

- Not only does investing in Canadian Energy provide jobs and wages for both Indigenous and non-Indigenous Canadians, it also generates taxes for all levels of government — which in turn are then used to fund education, health, social programs, infrastructure, and debt repayment. Post the COVID-19 pandemic, an estimated additional debt of $300-$500 billion promised by Canada's federal and provincial governments to bolster the economy and provide citizens and businesses with various emergency funds and subsidies, will have to be repaid somehow.

- Shutting-in the Canadian energy industry, the desire of some environmentalists, would not further the "ESG" mantra, as other oil and gas supplying countries like Venezuela, Saudi Arabia, Nigeria, Russia, and China will quickly fill any void of Canada's relatively miniscule 1.6% of the global GHG emissions. These other nations' records on human rights, gender equality, occupational safety, democracy, and the freedom of the press simply do not compare to ours. The Resolution ought to be defeated on these grounds alone. Our dependence upon other countries for our various supply chains is frightening (for example, the provision of reliable Personal Protective Equipment); shudder to think if we also had to rely on foreign suppliers for most of our energy, when it is beneath our very feet.

- Supporting the Canadian energy industry is better for Canadian unity. This engine of our Canadian standard of living, envied around the world, has been shamefully abandoned by certain Canadians who are unaware of how ubiquitous petroleum and hyrdocarbons are to their everyday lives, as well as what funds our overall standard of living and generous social safety net. Without them, for example, most of the products and equipment in our hospitals and homes would not exist. Imagine fighting the COVID 19 pandemic without them.

The world, and its well-intentioned people, need more Canadian Energy. They also need more information, like that above.

I personally suspect "Climate Justice" is really just code for being "Anti-Canadian Energy". Going further down this "rabbit hole" is not a wise use of the CBA's limited time and resources, particularly as we must emerge from the damage caused by the COVID-19 pandemic.

Just because certain other law industry associations in the U.S. and other Commonwealth nations may have allowed themselves to be hijacked in recent years by special interest groups like those seeking "Climate Justice", the CBA must be wary of falling prey to such ideological pursuits. Anecdotally, many of my colleagues who are current CBA members were frustrated to see the Resolution was before the organization; others explained they had already quit their CBA Membership because of efforts like this in the past.

The CBA's core mandate is to educate and advocate on subjects that matter to lawyers as lawyers and not as partisans on highly debatable social topics. Simply put, this kind of motion is divisive and not in the fundamental interest of the CBA.

The Resolution ought to be resoundingly rejected by CBA members.

Photo: "Pipelines" by outgunned21from FreeImages.com (https://www.freeimages.com/photographer/outgunned21-82976)

STEVE MAJOR is a Litigation Partner at Bennett Jones LLP in Calgary, and co-chair of the Canadian Energy Executives Association. Steve is also a past president of the Calgary Bar Association, and is the co-founder and co-chair of the Calgary Flames Ambassadors' Texas Hold 'Em Poker Tournament.

COVID-19 AND THE **REMOTE WORKPLACE**

BY **ELIZABETH ASPINALL**

When everything seems to be going against you, remember that the airplane takes off against the wind, not with it.

- Henry Ford

what we have been, or now are, we shall not be tomorrow

- Ovid, Metamorphoses

The beginning of 2020 has brought a seemingly endless adversarial wind in the form of the COVID-19 pandemic. For the Practice Advisors, that wind has brought calls from so many lawyers who are concerned about how to identify their clients, how to serve their clients, how to work remotely, how to implement a contingency plan should they fall ill, how to keep their doors open among falling billings, whether government is implementing changes to allow remote notarizing, and how lawyers can protect themselves and staff given that some client meetings are inevitable. Among other things.

This column could easily be a list of resources and answers to those kinds of questions. But, with each week bringing new challenges, last week's resources are less relevant to this week's needs. In addition, many organizations, including the Courts, Law Society of Alberta and CBA, issue regular electronic bulletins to answer questions. Those updates are more nimble than a quarterly column.

Better than a list of potentially outdated resources, or answers to common questions, perhaps, are updates and guidance about working remotely, and some comments about ways lawyers are engaging with the community. And, if you do have questions, the Practice Advisors (working remotely) provide support and endeavor to find answers. We will always do that in real time.

If you are feeling that your stress and anxiety levels seem higher than usual, you are not alone. As a profession, we suffer higher than average stress and anxiety. It only makes sense that trying to balance the practice issues created by a health crisis, working in isolation, having children at home, and potentially facing a loss or decrease in income will aggravate the stress and anxiety.

Globally, law firms have found incredibly creative solutions to alleviate the isolation. Some firms hold virtual gatherings, such as Friday after work get-togethers or weekly virtual lunches, where employees can join non-work-related video conferences. One firm holds virtual Sunday brunch for staff spending the weekend alone. Others set up virtual book clubs, app-based Scrabble tournaments, knitting clubs, daily meme competitions, competitions where employees can share the strangest thing that happened in their "office" that day, and even omelet-cooking competitions. One thing is clear: with only basic technology, viable virtual alternatives exist to most in-person activities.

For its part, the Law Society has created Skype Roulette (employees sign up and once a week are randomly assigned a coffee break with another employee), and a home office photo contest, along with daily updates from the organization's leadership.

As an employee working remotely, even if your organization has implemented opportunities to connect, consider alleviating the stress and isolation of working remotely by staying in touch with particular colleagues over video conference, schedule coffee over video conference, take lunch, and ensure you are turning your computer off and ending your work day at a reasonable time each day. Begin your workday properly, too: avoid waking up and immediately checking email. You could end up running out of time to get ready for whatever meetings you have. Remember, too, that the Alberta Lawyers' Assistance Society (Assist) offers confidential (and currently, online) psychological counselling and peer support. They are also offering free online lunch-hour yoga (contact them for details).

If you are involved in your organization's management, try to be flexible in the timing on work product, try to appreciate that many employees are balancing parenting, home-schooling and work. Remind employees of the organization's resources, such as benefits, that can help them alleviate the stress.

Working remotely can be isolating, but it is also instigating much-needed change in the profession. The legal profession notoriously lags behind other industries in implementing technology. Our deeply entrenched ties to the way things have always been done makes us resistant to new ways of doing things — even where those things not only ease some of the stresses of practice, but also improve access to justice.

The *Law Society Gazette* reports that in the last week of March, the first Skype trial in England and Wales "went without a hitch". The trial was conducted by video because of COVID-related concerns. The Judge determined that a traditional courtroom was too risky for participants. Arrangements were made for the three-day trial to proceed with all parties, including the Judge, appearing by Skype. The sky did not fall, and justice was served.

Using video-conferencing services like Skype and Zoom is not without risks. Lawyers using such services must ensure they understand the technology's functioning and security. *Yahoo Lifestyle Australia* reports that a woman who was working from home and participating in a Zoom meeting with colleagues did not realize that the camera function on her laptop was turned on. She took her laptop into the bathroom and exposed herself while heeding nature's call.

Another woman was attending a video conference with colleagues when her hapless husband walked onto the screen wearing a shirt and his underwear. Upon realizing her colleagues could see him, he tries to run out of the screen but instead runs into a wall and bounces back into view. It is a laugh-out-loud clip — for everyone except the couple, perhaps. Online meetings are still meetings. We have to understand the technology we are using and be aware of our workspace. Best practice would dictate that people attending remote meetings should carry on as they would if the meetings were in-person. When nature calls, for example, mute the computer and leave

it on your desk. And, while not all homes have multiple offices, each day, discuss your "workspace" needs and schedule with your family so as to avoid overly casual encounters between your family members and colleagues.

Finally, over the past few weeks we are again learning that lawyers are caring community members who contribute to their neighbours' well-being. Some lawyers are offering free legal information, and others are engaging in activities like online BINGO with anyone who wants to play — clients, friends, community members — to encourage people to "buy local". That same firm is offering free review of severance packages and demand letter severance negotiations on a contingency basis. We are hearing about lawyers meeting with clients in the parkade to witness clients signing conveyancing documents (the lawyer can see and confirm the documents being signed without having to be in the same "space" as the client), and lawyers using oven mitts and an oven to "cleanse" original documents before staff handle them. We have also heard of a firm hosting (prior to the orders prohibiting group gatherings) a thank you wine and cheese for members of medical professions.

Every one of these initiatives, from the Sunday brunch chats, to virtual knitting clubs, to "baking" (without flambéing!) conveyancing documents, speaks to a profession that is creative, passionate, and caring. Without question, the coming months will be challenging and the landscape at the end will be as unfamiliar as any we have ever encountered. What we can control, and what many firms are controlling, is the ability to care for people and maintain our sense of community.

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.

JUDICIAL **UPDATES**

COURT OF QUEEN'S BENCH

The Honourable Melanie S. Hayes-Richards has been appointed as a Justice of the Court of Queen's Bench of Alberta (Edmonton), effective March 6, 2020.

Nathan H. Whitling has been appointed as a Justice of the Court of Queen's Bench of Alberta (Edmonton), effective March 6, 2020.

Shaina Leonard has been appointed as a Justice of the Court of Queen's Bench of Alberta (Edmonton), effective March 6, 2020.

Jane Sidnell, Q.C. has been appointed as a Justice of the Court of Queen's Bench of Alberta (Calgary), effective April 6, 2020.

Barbara Johnston, Q.C. has been appointed as a Justice of the Court of Queen's Bench of Alberta (Calgary), effective April 6, 2020.

The Honourable Madam Justice K.M. Horner (Calgary) has elected to become a supernumerary judge effective April 26, 2020.

PROVINCIAL COURT OF ALBERTA

The Honourable Judge Gerald S. Dunnigan (Calgary) has been appointed as a part-time judge, effective March 1, 2020.

The Honourable Judge Lawrence G Anderson (Edmonton) has been appointed as a part-time judge, effective March 1, 2020.

D.R. Ackroyd, Q.C., retired as an ad hoc Justice of the Peace (Edmonton) effective April 1, 2020.

Jeffrey B. Champion, Q.C. has been appointed as a Judge of the Provincial Court of Alberta (Edmonton Region), effective April 14, 2020.

Tracy K.M. Davis has been appointed as a Judge of the Provincial Court of Alberta (Calgary Family & Youth), effective April 14, 2020.

Carole D. Godfrey has been appointed as a Judge of the Provincial Court of Alberta (Edmonton Criminal), effective April 14, 2020.

Francine Y. Roy has been appointed as a Judge of the Provincial Court of Alberta (Edmonton Criminal), effective April 14, 2020.

Brandy L. Shaw has been appointed as a Judge of the Provincial Court of Alberta (Calgary Criminal), effective April 14, 2020.

Robin A. Snider has been appointed as a Judge of the Provincial Court of Alberta (Central Region), effective April 14, 2020.

Eric J. Tolppanen, Q.C. has been appointed as a Judge of the Provincial Court of Alberta (Calgary Criminal), effective April 14, 2020.

POLICE RECORD CHECKS **IN ALBERTA**

BY **JENNIFER TAYLOR**

The Alberta Law Reform Institute [ALRI] recently published *Police Record Checks: Preliminary Research*. The paper:

- examines the statutes that partially regulate the disclosure of information in police record check results;
- reviews the calls that have been made for specific legislation to regulate police record checks;
- evaluates Ontario's *Police Record Checks Reform Act*, 2015 [*Ontario Act*]; and
- compares the *Ontario Act* with the Alberta Police Information Check Disclosure Procedures [Alberta Procedures] endorsed by the Alberta Association of Chiefs of Police [AACP].

Privacy and criminal law statutes place some limits on the disclosure of police information and, therefore, partially regulate the disclosure of information in police record check results. Privacy statutes — like Alberta's *Freedom of Information and Protection of Privacy Act* and the federal *Privacy Act* — require police services to obtain an applicant's consent before they conduct, and disclose the results of, a police record check. And, the *Criminal Records Act*, the *Youth Criminal Justice Act* and the *Criminal Code* limit the disclosure of certain police information.

Because privacy and criminal law statutes only partially regulate the disclosure of information in police record check results, there can be significant variation in the information disclosed by different police forces.

Some police record check results disclose non-conviction information. That is, they disclose details regarding (i) criminal charges that did not result in a conviction or finding of guilt and (ii) police interactions that did not result in any criminal charge(s). The disclosure of non-conviction information can unfairly and unnecessarily prevent an applicant from obtaining work, volunteer and other important opportunities.

Because of inconsistencies in the information disclosed by different police forces, and the controversial disclosure of non-conviction information in some police record check results, many have called for specific legislation to regulate police record checks.

The *Ontario Act* came into force in November 2018. It seeks to standardize police record check practices, and limit the disclosure of non-conviction information, in Ontario.

The *Ontario Act* fills the gaps left by privacy and criminal law statutes by, among other things:

- specifying the police record checks that can be conducted in Ontario (criminal record, criminal record and judicial matters, and vulnerable sector checks);
- listing the information that will be disclosed in the results of each type of check;
- defining "non-conviction information";
- restricting the disclosure of non-conviction information to the results of vulnerable sector checks;
- providing a test for the exceptional disclosure of non-conviction information; and
- establishing processes for correcting or challenging information disclosed in police record check results.

The *Ontario Act* is the first legislation of its kind in Canada, and many have recommended that other Canadian governments should adopt it or a similar statute.

Alberta lacks legislation like the *Ontario Act*. However, the contents of the Alberta Procedures, endorsed by the AACP in May 2018, are similar to the contents of the *Ontario Act*.

The Alberta Procedures:

- state that Alberta police services offer two types of police record checks (police information and vulnerable sector police information checks);
- explain that criminal record checks (a third type of police record check) can be obtained through private companies accredited by the Royal Canadian Mounted Police;
- list the information that will be disclosed in police information check [PIC] and vulnerable sector police information check [VSPIC] results;
- define "non-conviction information";
- provide a test for the exceptional disclosure of non-conviction information; and
- establish an appeal process for challenging information disclosed in PIC and VSPIC results.

Although the contents of the Alberta Procedures are similar to the contents of the *Ontario Act*, there are significant differences between them. Unlike the police record checks available under the *Ontario Act*, those available under the Alberta Procedures do not really disclose different levels, or amounts, of information. Both PICs and VSPICs routinely disclose:

- criminal convictions;
- findings of guilt under the *Youth Criminal Justice Act;*
- absolute and conditional discharges;
- outstanding criminal charges and arrest warrants;
- certain court orders;
- not criminally responsible on account of mental disorder findings;
- alternative measures;
- youth extrajudicial sanctions; and
- stays of proceedings.

Moreover, both PICs and VSPICs have the potential to disclose "non-conviction information", whereas, under the *Ontario Act*, only vulnerable sector checks have that potential. The only difference between the information disclosed in PIC and VSPIC results is that VSPIC results disclose sexual offence convictions for which a record suspension (pardon) has been granted, in

THE PATH **YOUR JOURNEY THROUGH INDIGENOUS CANADA**

'When you know better, you can do better' is the CBA's philosophy in responding to the Calls to Action from the Truth and Reconciliation Commission.

The CBA's newest initiative in meeting that commitment is The Path – Your Journey Through Indigenous Canada. Launching in April 2020, this educational program seeks to increase awareness of the legacy of the Indian Residential School System, support anti racism/bias training, and increase cultural competency as it relates to the Indigenous community.

The CBA is offering 500 free registrations to members that sign-up as part of our response to the Truth and Reconciliation's Call to Action to offer cultural awareness training for lawyers.

More information is available online at http://cba.org/Truth-and-Reconciliation/Professional-Development.

PANDEMICS IN THE WORKPLACE **ARE YOU PREPARED?**

The CBA has a number of resources related to the COVID-19 outbreak available on the COVID-19 Resource Hub. Resources include:

- **Pandemics and the Workplace: A Resource for Lawyers handbook.** A compilation of laws, cases and best practices to help advise your clients during the next pandemic.
- **Webinar: Pandemic Preparedness.** A recording of the webinar held on December 3, 2014.
- **Podcast: Pandemics in the Workplace.** What do you do in a pandemic? How do you protect the workplace? Learn more with guest Sheila Osborne-Brown.
- **Podcast: How to Become a Legal Influencer.** Legal advice via Instagram? Client outreach through Snapchat? Legal influencer Jamie Benizri shares his tips on legal marketing online.

See a full list of resources and other materials at https://cba.org/Membership/COVID-19.

SOCIAL DISTANCING **INCLUDES SIGNATURES**

In normal times, official documents such as forms for GST or HST rebates on new home transactions require a "wet" signature – meaning the ink has to be on the form itself.

But in these days of global pandemic, getting that signature can be challenging — and perhaps dangerous. People are already taking measures such as meeting with their solicitors by teleconference, making it harder to produce and deliver a wet signature.

That's why the CBA's Real Property Section has written to the Canada Revenue Agency asking that the rules be relaxed for the duration of the pandemic.

Read more: http://cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2020/March/Social-distancing-includes-signatures.

AN OPPORTUNE TIME **FOR ACCESS-EQUALS-DELIVERY MODEL**

Access-equals-delivery (AED) is an idea whose time has come, the CBA's Business Law Section says in response to the Canadian Securities Administrators' proposed model for prospectuses and other documents.

"Regulator and administrative practices have evolved to allow electronic delivery and to give investors the option of not receiving certain documents (e.g. financial statements)," the Section says in its submission. "An AED model is a reasonable extension of these practices."

Benefits of an AED model include easier access to relevant documents; a reduced administrative burden — particularly important for junior issuers; easier tracking of delivery and receipt than with paper documents sent through the mail; reduced costs; and environmental benefits from reduced paper use.

Read more: http://cba.org/Our-Work/cbainfluence/Submissions/2020/March/An-opportune-time-for-access-equals-delivery-model.

continued from p.25

accordance with the *Criminal Records Act*.

The Alberta Procedures also contain a much broader definition of "non-conviction information" than the *Ontario Act*. Consequently, Alberta PIC and VSPIC results have the potential to disclose some information that will never be disclosed in any police record check results under the *Ontario Act*, like details regarding alternative measures and police interactions that did not result in any criminal charge(s). Other differences between the Alberta Procedures and the *Ontario Act* are discussed in ALRI's paper.

The Alberta Procedures were only recently adopted by all Alberta police services and published. The AACP has acknowledged that there is room for their improvement and seems open to revising them. Accordingly, time may tell whether Alberta needs specific legislation to regulate police record checks, and ALRI has decided not to proceed with a police record check law reform project at this time.

ALRI's paper contains its preliminary research findings. Its publication is intended to promote discussion about police record check practices in Alberta.

Website: www.alri.ualberta.ca
Email: reform@alri.ualberta.ca
Twitter: @ablawreform

JENNIFER TAYLOR is Counsel at the Alberta Law Reform Institute (ALRI). Prior to joining the ALRI, she worked as Legal Counsel to the Court of Queen's Bench of Alberta and the Court of Appeal of Alberta. Jennifer has a Master of Laws with a focus in International Law from Dalhousie University.

LAW MATTERS GOES DIGITAL

With the assistance of CBA National, the CBA Alberta Editorial Committee is in the process of moving *Law Matters* onto a fully digital platform. As we transition to our new digital platform, our editorial schedule will change slightly.

This current issue will be the penultimate issue released in print, and the summer 2020 issue which normally would be released online only, will instead be our final print issue.

Starting with this issue, we have some online exclusive content on the COVID-19 outbreak and its impacts on the legal profession in Alberta. Our online contributors include:

- Insurance Coverage in a Pandemic by Michael Doerksen (Field LLP)
- Family Law in the Time of COVID-19 by Emily Varga (Jones Divorce Law)
- Remote Dispute Resolution by John-Paul Boyd, Q.C. (mediator and arbitrator)
- The Impact of COVID-19 on the Criminal Justice System by Nicole Rodych (Ruttan Bates)

The online content will be hosted on www.nationalmagazine.ca/LawMatters and can also be accessed on the CBA Alberta website at www.cba-alberta.org/Law-Matters.

CBA ALBERTA SECTION MEETINGS

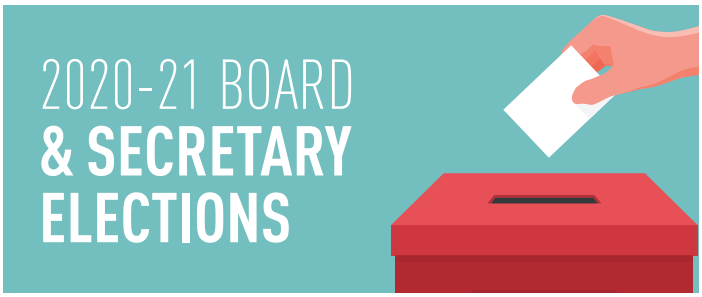
As we all work together to help stop the spread of COVID-19, it is important that while we socially distance ourselves from our neighbours we do not lose our sense of community.

To that end, until this pandemic is over and we are able to resume our in person meetings, we are offering Section meetings to all CBA Alberta members for free. Our meetings will all be delivered by webcast, which will allow you to view them from the comfort of your home or office. A list of upcoming events is available below, and also on our PD calendar at www.cba-alberta.org/Calendar.

We will still maintain exclusive benefits for our Section members, including access to meeting recordings and materials. If you are not a Section member and would like access to these benefits, you can register as a materials-level member of any Section for only $35.00, and access past recordings and material for all of the 2019-20 Section meetings.

We are pleased that our Section meeting offerings have now largely returned to regular levels. On behalf of the CBA Alberta staff, we thank you for your patience as we moved to a fully remote delivery of Section programming.

CBA ALBERTA ELECTIONS



Voting for the 2020-21 CBA Alberta Board of Directors and Secretary elections is open until **noon on Monday, June 1**. All eligible voting members of CBA Alberta will have received their ballot by email from our election platform Simply Voting, and can vote at the link provided.

We have a distinguished list of candidates who put their names forward for the Board of Directors and Secretary position this year, and you can familiarize yourself with these candidates by visiting the election page of our website at www.cba-alberta.org/Election.

CBA ALBERTA VOLUNTEER OPPORTUNITIES

We are now recruiting CBA members to participate in volunteer opportunities during the 2018-19 membership year. Much of the work that the CBA does throughout the year is only possible with the assistance of a group of dedicated volunteers, and we encourage all members to find ways in which they can get involved.

There are a variety of committees that are always looking for new volunteer members, including Access to Justice, Editorial (Law Matters), Agenda for Justice & Advocacy, Equality, Diversity & Inclusion, Law Day and Legislation & Law Reform. There are also opportunities to participate in Sections, either through Section leadership or as a speaker at one of our many Section meetings.

To indicate your interest in CBA Alberta volunteer opportunities, please visit www.cba-alberta.org/Volunteer.

BOARD OF DIRECTORS MEETING SUMMARY

The CBA Alberta Board of Directors is committed to providing transparency to members by publishing summaries of its meetings online. You can read summaries of the most recent Board of Directors meetings on our website at https://cba-alberta.org/Who-We-Are/Governance/Board.

INTELLECTUAL PROPERTY. Let us work with you in protecting your clients. Patents, Trademarks, Copyright. Stemp & Company, Lawyers and Patent Agents, **www.stemp.com. P: 1-800-665-4447 or 403-777-1123. E: kari@stemp.com or bill@stemp.com.**

WILL SEARCH. The Public Trustee of Alberta is seeking the will of Anna Olijnyk, late of Calgary. Please contact direct: **403-297-7082 or mail 900, 444 - 7 Ave SW, Calgary, AB T2P 0X8.**

GOOGLE REVIEWS. Get more (and better) Google reviews with this system. Former lawyer helping lawyers since 2007. **See lawyer-reviews.ca. Keith Perkins (250) 215-7194.**

WILL SEARCH. We are seeking the Will of the late RAMSAY GRAVES (date of death: June 26, 2009) of Calgary, Alberta. **Please contact Beaumont Church LLP Attn. Yvonne M. Williamson at 403-261-8353.**

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