WELDON

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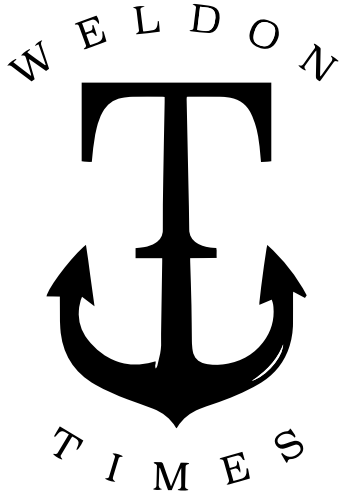

The Weldon Quarterly is written and published by the law students of Dalhousie University.

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Dalhousie University sits on Mi'kma'ki, the traditional territory of the Mi'kmaq.

To Our Readers

Dear Students of Schulich, Weldon, Dalhousie, etc.,

To new and returning students: welcome and welcome back! Here we are, a motley group mottled together from across the country and—as the school will no doubt remind you—the globe. We (your Editors) hold one geographic trait in common: we both hail from the middle of nowhere—namely, Alberta's North (Justin) and Nova Scotia's Cumberland County (Anthony).

The differences don't stop at the map. There's culture, race, politics—all the things that make people get along. Diversity of perspective will not divide but unite, however, if those perspectives engage in conversation. The Weldon Times, while providing updates on the goings-on of the Canadian legal world, also hopes to provide a platform for such conversations. We encourage students to contact us at weldont@dal.ca with articles about the subjects of the day, be they legal ponderings or simply the best places to eat around town. Or, if you know you'd like to write, but not what about, you can contact us to discuss some possible topics.

To our new 1L's, we think this letter is a prime opportunity to offer some advice for tackling your first year of law school. Firstly, law school is hard! It will likely be one of the most challenging learning experiences of your life. That being said, the hard work can be rewarding. So, while there will be times when you're sick and tired of reading cases, and you really don't want to carry that big, heavy intro to criminal law book around, don't give up! Keep on top of your readings and don't rely on CANs as a substitute for the case itself. Not only will reading the assigned cases give you a better understanding than the CANs, it will also help you to understand legal reasoning and argumentation.

Secondly, GO TO CLASS! Even if you fall behind in some readings (which you inevitably will) class time allows you to get important analysis straight from your professor and classmates (one of which has hopefully done the day's readings). Consider attending your professors' office hours as well, but don't expect another lecture. Rather, make sure you bring particular questions about points you are struggling with—unless you want to sit with your prof in awkward silence (trust us, it happens).

Our fourth piece of advice: don't be afraid to engage in class discussions. In 1L, almost everybody is struggling to come to grips with the material. Perhaps you think the majority opinion got it wrong in the case you are discussing. Throw your hand up and argue your point. And if you're really feeling adventurous, try arguing for the side that you ***don't*** agree with!

Finally, and perhaps most importantly, find a good balance between your studies and social life. DOMUS can help with this. There are plenty of societies to get involved with at Weldon, and there are plenty of people to meet, places to go, and things to do in Halifax. Schulich has a bucket load of support to help you through the law school experience so don't be afraid to **reach out to anyone** (even professor Shapiro – he's all bark and no bite) if you're having a tough time.

We wish you all the best in your legal studies! Remember, we're all in this together.

Justin Monahan and Anthony Buckland

From Ford Nation to Orientation: My First Week at the Schulich School of Law

Madison Ranta 2L

Having studied journalism for my undergraduate degree, I'm used to summarizing facts and asking important questions. I've interviewed hundreds of people from all walks of life, ranging from flat earth conspiracy theorists to the host of a national news show. Working for the news website iPolitics in Ottawa, I was able to report on House of Commons and Senate committee meetings as they questioned expert witnesses and reviewed proposed legislation. This experience made me realize that I wanted to have a greater hand in shaping what becomes law and makes the news, rather than just reporting on it.

I grew up in Thunder Bay, Ontario, a town that holds the dishonour of being the hate crime capital of Canada due to racism against First Nations residents. We've made international news for our high rate of Indigenous student deaths, chronicled in Tanya Talaga's book "Seven Fallen Feathers." Watching professor Naiomi Metallic testify to the Senate's committee on Indigenous issues this past spring strengthened my desire to use the law and legal advocacy to help fight against institutional colonialism and for Indigenous rights.

When people ask me why I decided to attend Dalhousie for law school, I tell them about one specific incident that helped make up my mind.

While attending the Weldon Welcome Days this past March, I was lucky enough to be invited to a student-hosted dinner at Melissa Earl's apartment. During the course of our evening, the subject of special talents was brought up. Then-first-year student Nadine Otten casually mentioned the fact that she could slice an apple clean in half by whacking it with her forehead on a table. Naturally, we demanded a demonstration. Melissa brought her an apple. True to her word, Nadine spliced that Granny Smith straight down the middle.

It was then I knew this school was for me.

Okay, so maybe there were also some other factors at play, including my desire to flee my native Ontario for the remainder of Doug Ford's premiership. But sitting in room W105 on the first day of orientation, the guest speakers in attendance reaffirmed that I had made the right decision.

I know I wasn't the only person who appreciated the brief speech given by Law Students' Society President Ellen Williams, who told us that "you deserve to be here," regardless of your background or the path you took to law school. The sentiment was echoed on Thursday by Justice R. Lester Jesudason, who appeared alongside Nova Scotia's Chief Justice, Michael Wood, to talk about his experience working behind the bench. Jesudason shared his unconventional and unplanned route to his judgeship, from taking the LSAT on a whim to never having met a lawyer prior to starting law school. His message was one of reassurance: it doesn't matter what path you took to get here and it's okay if you're unsure where you want to go. You still deserve to be here.

The students, professors and staff who took part in Friday's "What I Wish I Knew" panel echoed these same sentiments. As professor Jon Shapiro noted, grades don't necessarily dictate how much success you'll have as a working lawyer—if you choose to work as a lawyer at all. Professors Nayha Acharya and Maria Dugas both shared stories of their unconventional routes to law school, proving that there's no "right way" to become a lawyer. Having people from a diversity of backgrounds studying law is an attribute to the strength of the profession.

And as Dean Cameron pointed out on Tuesday, the class of 2022 certainly reflects this diversity. The current cohort of 1Ls includes everyone from mature students to people fresh out of undergrad, from Victoria to St. John's, from science and math backgrounds to music degrees.

All of these experiences throughout the course of orientation week culminated in a sense of reassurance. There's no one right way to do law school. Everyone feels imposter syndrome. You'll still be okay. As the societies fair that closed out orientation activities on Friday proved, no matter your background or your interests, there's a place for you here.

1-8-1-1-1-8: CCLISAR and The Open(-ish) Court Principle

Monica Dairo 2L

This past summer, the Schulich Internship program allowed me to work with the Canadian Centre for Legal Innovation in Sexual Assault Response (CCLISAR) under the guidance of Professor Elaine Craig. I had a few assignments related to sexual assault policy, but my main task was to determine how third-party researchers could access court transcripts from different provinces and territories.

With the completion of 1L, I'm at that sweet spot of being at the starting point of my legal education: knowing enough terminology to pass an exam, and not enough to pass the bar. With that confidence, I began to work. During my research, I learned about the practical challenges of adhering to the "open court principle" and its tension with the protection of the privacy of parties in a case.

The Alberta Court of Appeal called the open court principle "a central tenet of our justice system" *Aboriginal Peoples Television Network v Alberta (Attorney General)*, 2018 ABCA 133 (CanLII). While not well defined, the principle has among its objectives a goal of facilitating public access to the justice system. In doing so, the principle ideally polices the rule of law by making the administration of justice transparent and accountable. A clear example can be found in the form of one word: CanLII. It is relatively free and easy for the public to access.

Unfortunately (or fortunately depending on which stage of LRW you're in), there is no CanLII for transcripts. To complicate matters further, the process for ordering transcripts differs across the provinces and territories. Each region has their own ordering description, forms, and system—and "system" may be too generous a word for some. While I was working on a single province or territory, I needed to connect with numerous different departments and people to properly fill out ordering forms. There is also the cost of transcripts to consider, which ranged anywhere from $90-$500.

Here are a few more specific examples. It took one hour or more to speak with an appropriate representative at the Manitoba Court of Queen's Bench because their automated system kept me in a loop, stuck pressing '1-8-1-1-1-8' until I reached a real person. I often had to make follow-up calls because I absolutely needed to collect certain relevant information, and the first calls often led nowhere. In Ontario, even with their transcript order guide, I had similar issues when trying to connect with the appropriate people. B.C.'s online records system was incomplete and not that useful (although kudos to B.C. for the ease I had in reaching their Supreme Court). P.E.I. and Quebec required a specific letter to be sent to the presiding judge whereas BC needed a court order. The transcript ordering process was further complicated by the fact that I was trying to order sexual assault trial transcripts, some of which had a publication ban on them.

> *"I'm at that sweet spot of being at the starting point of my legal education: knowing enough terminology to pass an exam, and not enough to pass the bar."*

To put it simply, the process of obtaining transcripts from each province and territory was not easy for me, and I assume it would be similarly challenging for someone else with little legal training who was not a party to the case. However, while the cost and challenges of accessing court transcripts can be practical barriers in accessing justice, this challenge may not be a terrible thing.

On one hand, there are access to justice arguments

for strategies, administrative and technological, to streamline the public transcript ordering process. Indeed, perhaps it may be worth the effort to provide a separate mechanism for researchers looking to access transcripts, similar to what the media has—although what this would look like, or how a system could effectively distinguish researchers from the media and the general public, I do not know.

On the other hand, the complexity of obtaining transcripts makes it more difficult for the general public to access the personal information of the parties involved. Jane Bailey and Jacquelyn Burkell's research on the open court principle in Canada suggests that the broad interpretation of the principle means the "presumptive access to almost all aspects of court cases, including access to personal information about parties and witnesses". Fortunately, Bailey and Burkell note a few mechanisms that limit this default presumption, e.g. the publication ban of personal information about sexual assault complainants in criminal proceedings. Regardless, for cases that do not have mechanisms to protect the parties involved (including some sexual assault cases in civil proceedings), the default remains.

More so, while transcripts cannot generally be found online, Bailey and Burkell are reasonably prudent about the increasing public access to court records online. The redaction of identifiable personal information could be a decent way to preserve the parties' privacy, but this method would need a few modifications. Among others, the redaction would need to go through the process of counteracting the presumption of the open court principle, act as an additional administrative step in the transcript process, and be done in a way that precludes the possibility of undoing the redaction online.

Overall, given my own interest in access to justice, the two-month internship with CCLISAR provided me with various stimulating and challenging work. In addition to research, emailing, and asking God for serenity while I looped through 1-8-1-1-1-8, I was given

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A Summer at PAHRO

Michael Marot 2L

When I learned I'd been chosen as a recipient of the Schulich Academic Excellence Fund, I eagerly reached out to previous volunteers to learn about their experiences. I wanted to know what to expect for my Projects Abroad Human Rights Office (PAHRO) placement. Even so, when they warned me about how difficult working abroad can be, especially at the start, I foolishly thought I'd be unaffected. My family, after all, had lived in South Africa before. Spoiler Alert: I was wrong.

Those first few days in Cape Town, I was entirely overwhelmed by the change of pace from Haligonian life. I seriously questioned why I'd left the comfort of my regular summer job back home. I was living with a lovely host family in Grassy Park, a relatively safe southern suburb that was only a five-minute walk from some of the most dangerous gang territory in the city. On my first night in the house, I was horrified to learn that, most nights, my roommates went to bed without locking the door.

At the office, I was thrown into the deep end: after a few quick orientation meetings, they handed me fifteen cases and told me to get to work. On my second day, I attended my first clinic, where clients told me they wanted to file an eviction order against their son, get a divorce from their abusive husband, or negotiate the sale of their property. I was utterly terrified that I'd say the wrong thing and didn't know the first thing about any of the paperwork they needed. Thankfully, once I returned to the office, the staff and more experienced volunteers were quick to provide me with guidance. From there it was just a matter of following instructions and If you're not afraid to admit you have no idea what to do, it quickly becomes a matter of following instructions. I had to ask for help a lot, but it wasn't long before I started to get the hang of it. Hopefully all the divorce summons, affidavits, and notice of motions I drafted will provide me with some semblance of a head start for Civil Procedure this year—but that remains to be seen.

Roughly two weeks into the program, I had settled into a comfortable routine. I actually knew what I was doing at work and was familiar with my clients. Naturally, my supervisors felt I was ready to handle a greater caseload. I now had over thirty-five files ranging across family, labour, contract, property, wills & estates, criminal, and refugee matters. I was solely responsible for conducting the research and preparing paperwork on each file. Most of the time I met with my clients one-on-one, without any supervision. If you're considering a work placement in a third-world country, I'd highly recommend it for this reason. I was trusted with much more responsibility than a typical first year summer student in a Canadian office. You get hands on experience at a level you couldn't receive at home, and you get the opportunity to make a positive impact in the lives of truly disadvantaged people.

"I was thrown into the deep end: after a few quick orientation meetings, they handed me fifteen cases and told me to get to work."

The other PAHRO initiative I loved was the Social Justice Department, where each week we had the opportunity to give back to members of the local community. The Department organized several different programs, including food drives and youth soccer tournaments. But my favourites were the prison visits. On those days, we'd visit a youth

detention center and give a prepared presentation on a certain topic to kids ranging from eleven years to twenty years old. Engaging the kids was a challenge, especially considering the language barrier. But the connections I did establish were extremely rewarding. I always made sure to take the time to sit and chat with a group of kids at the end of each session about whatever they wanted, as I found this was when they were at their happiest. The stories these kids told, and the lives they've lived, were remarkable. Many were forced into gang life and had committed serious crimes—yet, at the end of the day, they acted no different than any other eager school children.

All and all, it was an incredibly rewarding summer. There were many moments when I felt hopelessly lost, and even more where I couldn't contain the smile on my face. Working at PAHRO taught me about myself, and about the realities of practising law. I can confidently say that I wouldn't trade my

> *"You get hands on experience at a level you couldn't receive at home, and you get the opportunity to make a positive impact in the lives of truly disadvantaged people."*

MICHAEL MAROT, PICTURED IN CENTER HOLDING SOUTH AFRICAN FLAG, WITH HIS PAHRO TEAM.

DTAS

The Dalhousie Trial Advocacy Society (DTAS) is a new society whose purpose is to provide students with the opportunity to learn about trial level litigation and the skills needed to succeed as a trial lawyer. As upper years know, and as 1L's will soon discover, much of law school is focused on the appellate level. The cases we read are almost entirely at the appellate level and all the moots (except Sopinka) are appellate level moots. While there are a few courses regarding trial level litigation, students must wait until 3L to take them. DTAS hopes to expose students to trial litigation earlier in law school. We plan to invite practicing lawyers to speak with students about various aspects of both civil and criminal trial litigation, organize trips to the courthouse to sit in on trials, and perhaps even eventually host a mock trial. If litigation is something you might be interested in, email us at dtas.schulich@outlook.com

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LEGAL NEWS BRIEFING: Summer Edition

Inquiry into Missing and Murdered Indigenous Women

The National Inquiry into Missing and Murdered Indigenous Women and Girls was released in June. The report is the conclusion of an inquiry that spanned the country. Over two thousand individuals participated, including testimony from over 700 survivors and family members. The Inquiry held twenty-four hearings across Canada, visited fifteen correctional facilities, and led four Guided Dialogues and eight validation meetings. The Report found that thousands of Indigenous women and girls have gone missing, been murdered, or been the victims of violence, with likely thousands more unreported. The Report included a supplementary, but detailed, legal analysis of the term "**genocide**" and concluded that the elements of genocide are made out against Canada. In its analysis, the Report discussed Canada's past policies and actions regarding Indigenous peoples, namely: the *Indian Act*, Residential Schools, the Sixties Scoop, and forced sterilization, to name only a few. The report concludes with 231 "**Calls for Justice**," which the inquiry's commissioners stated are not mere recommendations, but legal imperatives based on international, Indigenous, and human rights law.

Bill C-75

On July 21st, Bill C-75 gained Royal Assent, ushering in sweeping changes to **criminal procedure** and the classification of offences generally. Notably, C-75 removes preliminary inquiries for those offences that are not punishable by imprisonment of fourteen years or more, reclassifies a large number of former indictable offences to hybrid offences (indictable or summary conviction), and adds a reverse onus at bail hearings for an accused in domestic violence cases. C-75 also removes peremptory challenges of jurors and modifies the process for challenging a juror for cause.

Supreme Court Appointment

Justice Nicholas Kasirer has been appointed to the **Supreme Court of Canada** effective September 16th. He will assume the Quebec seat of Justice Clement Gascon, who announced his early retirement from the court in April. Since former Chief Justice Beverley McLachlin stepped down in 2017, the Court has seen a large uptick in non-unanimous decisions. Given justice Kasirer's background in both common law and civil law traditions, as well as his academic experience as professor at McGill from 1989-2009, many are hoping he can help bridge the gap in the Court and encourage consensus on important legal issues.

Legal Aid

With the 2019 election fast approaching, the **CBA** is urging its members to make legal aid an **election issue**. The #legalaidmatters campaign asks members to write their local candidates asking them to support an increase in continued and sustainable **legal aid funding**. The campaign is heavily utilizing social media, providing members with different online tools to get the word out. This campaign comes on the back of a recent announcement by the federal government for a one-time cash injection into legal aid funding for immigration and refugee services, which itself was in response to advocacy by the CBA for funding in

this area.

R v Stillman

The SCC decided, in *R v Stillman*, 2019 SCC 40, that **military personnel charged with civilian offences** can be **tried without a jury**. The issue was whether the *National Defence Act* breached the s. 11(f) right of military personnel who committed a civilian offence in a non-military setting. S. 11(f), right to trial by jury, does not apply to crimes committed under military law. However, the *National Defence Act* essentially brought a large number of civilian offences under the umbrella of military law, thereby allowing trials by military tribunal rather than by judge and jury. The SCC held that the Constitution gives Parliament the power to pass legislation stipulating that civilian crimes committed by military personal are **service offences**. As such, the military exception to trial by jury applies to military personnel accused of committing the stipulated civilian crimes.

The SCC on Sexual Assault

The SCC handed down three **important decisions** regarding the admissibility of a complainant's sexual history in sexual assault trials. There are strict rules in the *Criminal Code* regarding when the **sexual history of a complainant** can be raised at trial. In *R v Barton*, 2016 SCC 33 the majority held that the trial judge made serious mistakes in allowing the defence to put to the jury the prior nights sexual history of the deceased. Moreover, the trial judge failed to properly instruct the jury on the use of this evidence in their decision. In *R v Goldfinch*, 2019 SCC 38 the SCC similarly held that the trial judge erred in allowing the defence to tell the jury that the defendant and complainant were in a "friends with benefits" relationship. The defence argued the evidence was to give the jury context in understanding the relationship between the defendant and complainant. The majority of the SCC held that the evidence should not have been allowed because its only use was insinuating that because the complainant had consented in the past, she had therefore likely consented at the time in question. The two aforementioned decisions highlight the important point that the jury cannot use **past consent** to determine whether or not a complainant consented to the later sexual act (nor can this evidence be used to determine whether the accused honestly believed the complainant consented). Finally, in R v R.V., 2019 SCC 41 the majority of the Court held that the defendant should have been permitted to cross-examine the complainant, in a limited manner, as to her past sexual history. The complainant became pregnant shortly after the alleged assault took place and had stated that she was a virgin before the alleged assault. The Crown introduced evidence of the complainant's pregnancy and virginity to support its case. The defendant's position was that no assault had taken place and that someone else could have gotten the complainant pregnant. As such, the defendant wanted to question the complainant as to whether someone else could have gotten her pregnant. The trial judge decided not to allow this. The SCC agreed with the court of appeal that it was unfair to allow the crown to introduce and rely on evidence without giving the defence the ability to challenge this evidence. The **presumption of innocence** required, in this case, that the accused be allowed to question the complainant on this issue in order to properly attempt a defense. The pregnancy was clear evidence that sexual activity had indeed happened, but it was not definitive as to who the activity happened with or when it happened. Importantly, in this case, the complainant's past sexual history was not going to be used to support a claim of consent or mistaken belief of consent. Rather, the purpose was to challenge the suggestion that the sexual activity at issue (the alleged assault) must have been with the defendant.

My Adventures at 133 Troop Ave

Robert Belanger 2L

The most terrifying part of my 1L year was applying for summer jobs. Everyone assured me it was not the end of the world if I didn't get a legal job out of the gate, but I didn't care. I still stressed about it and did everything I could to get that elusive 1L position. But after going through the OCI process in Calgary and Halifax, which was physically, emotionally, and mentally exhausting, I came up empty-handed.

But everything turned out okay. I ended up receiving a position at the Canadian Red Cross (CRC), Global Relations and Humanitarian Development Team through the Schulich Internship program. As an intern, I researched International Humanitarian Law (IHL) (also known as the law of armed conflict.) I have always been passionate about International Law, and this internship provided me the opportunity to finally do extensive work in this area of law. Over the summer, I performed fulfilling work with a great organization, supported by a wonderful group of people.

Before discussing my summer, I should explain IHL and why the Canadian Red Cross is involved in its dissemination. I faced a steep learning curve while trying to understand IHL. For the first few weeks, I spent hours reading and learning about what constitutes IHL. In order for me to understand the legal basis of IHL, I needed to read the four Geneva conventions of 1949 as well as the three additional protocols. The conventions and additional protocols are the legal foundation of IHL. The rules surrounding war are codified in these documents and it is up to the State to make sure they follow these rules. One thing I quickly learned is that there are endless legal issues and interpretations surrounding IHL and the Conventions. The rules of war have changed drastically since the founding of the International Committee of the Red Cross in 1863, and a variety of complex issues have since arisen that must be addressed.

During the course of my internship, I researched: determining Prisoner of War status, sexual and gender based violence in armed conflict, the application of transitional justice, the rule regarding weapons use and the prohibition of types of weapons systems, cyber warfare, migration and displacement, the development of autonomous weapons systems, the classification of armed conflict, targeting civilians, the meaning of direct participation in hostilities, children in war, and the protection of health care workers in armed conflict. Needless to say, IHL is a vast field of law that requires legal answers for a plethora of issues. Learning about how IHL protects people changed how I viewed international law and gave me a better understanding of how it is applied in the world.

As my internship progressed, I developed an understanding about the theory surrounding IHL. The reason IHL is so different from other fields of law is that when it is taken to its fullest, people will die. IHL reflects the rules of armed combat, and in armed combat, people can be legally targeted and killed. The purpose of IHL is to take one of the most brutal aspects of human nature, war, and make it as humane as possible so its human costs are as limited as possible. IHL is a simultaneously idealistic and pragmatic field of law: the intention is clearly to make the world a better place, but this intention is limited by IHL's inherent difficulties. As an intern I had the opportunity to learn about how scholars in IHL dealt with this paradox.

Of course, I didn't make any consequential legal decisions during my internship. Those sorts of decisions are usually made by the International Committee of the Red Cross in Geneva. What I had to do was research, analyze, and present on IHL to assist with its dissemination to the Canadian public. The Canadian Red Cross has

a responsibility to educate Canadians about IHL and I did my role to help make that possible. The CRC has legal analysists from coast to coast and they were always eager to help me with any questions I had. The analyst I worked with, Marie-Laure, was always eager to assist me with my numerous questions and always gave me difficult but compelling work. I know I would not have had as fulfilling a summer without her help and support.

A large part of what made my summer experience so enjoyable was the people in the Halifax office. Each of my coworkers was a joy to work with, and each performed unique, interesting work, including disaster management, occupational therapy, first aid training, and philanthropy. We enjoyed our numerous potlucks and afterwork hangouts. We even made a workplace garden, which greatly improved the quality of my sub-par lunches.

When the winter semester ended, I was still searching for a job and was unsure about my summer. I was stressed and unsure of myself after the school year. I quickly learned that things will turn out okay. I managed to get a great job that offered me a unique legal learning experience. I learned more about a field in which I was deeply interested and gained an appreciation for the work done by the Red Cross. If I was to offer any advice to first years who are already concerned about what they are going to do for their summer, all I have to say is: don't stress too much about it, and don't be afraid to reach into legal fields you are passionate about, but are not necessarily practiced at big firms. If you are interested about a specific legal topic, apply to related jobs. I did, and I found enjoyable and fulfilling work in a field I truly care about.

ROBERT BELANGER PICTURED HERE WORKING AT THE CANADIAN RED CROSS ON GLOBAL RELATIONS AND HUMANITARIAN DEVELOPMENT

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Summer at a Boutique Law Firm

Caitlin Schropp 2L & Danielle Deagle 2L

First Summer Law Job:

A lot of friends and family members have asked us how our first summer law job went. Well, after focusing primarily on theory throughout the school year, it was an incredibly beneficial practical learning experience. Working in a law firm is quite different than studying the law, and this difference can be intimidating for students starting their first law job. The good news, however, is that no employer expects you to know a great deal after your first year of law school. What they do expect is that you will try, work hard, ask questions, and learn. And, if you have made it through your first year of law school, then you will have undoubtedly mastered these skills.

The reality is that law firms and lawyers have different goals than law school professors. Learning these different goals can be one of the most difficult challenges of your first summer law job. Instead of meticulously reading through your long and thorough legal memos, many lawyers are only going to read your short answer. It is not because they don't appreciate your impressive writing style, but simply because they often don't have the time to read the entire memo. Lawyers often simply want to know what the answer is and what cases support and challenge that answer. Likewise (and don't tell any of the librarians) many practicing lawyers don't want you to spend more time than necessary on citations. As long as they can find the case, they'll be happy with your citing.

Learning these sometimes subtle (and sometimes not so subtle) differences between the theory and the practice of law were one of the most fascinating parts about working a summer law job for the first time.

Working at a Boutique Personal Injury Law Firm:

One of our biggest reasons for applying to NOVA Injury Law is the unique experience of working at a small personal injury law firm. Summering at NOVA Injury Law was an experience unlike those found at larger firms. Of course, we were still doing classic summer student legal jobs, like drafting documents, doing research, and producing memos, but on top of that, we also had the opportunity to be involved in firm development. At the beginning of the summer, we were each assigned a firm marketing job that we would develop over the course of the summer. These jobs included developing a personal injury damages calculator and a car accident assistance map of Halifax. We also spent time each week drafting blog posts on personal injury topics, which were like mini-research memos. Through drafting these blog posts, we quickly became well-versed in the law surrounding long-term disability and motor vehicle accident claims.

As summer students at a personal injury firm, we dealt extensively with car accidents, slip-and-falls, and their resulting injuries. Drafting settlement proposals always began with requesting and sorting through the entirety of our clients' medical records. In the process, we all learned a lot about the insurance and medical systems, along with a great deal of medical terminology. Additionally, through drafting settlement proposals, we were able to pick up learning where our Tort Law class had ended, gaining experience in quantifying damages.

One of the best things about personal injury law is the "personal" side of it. We immediately began interacting with clients and would frequently call them on the phone to gather information for their claim. We also each spent several days answering the phones and conducting intake calls. The client interaction, as well as the social and amicable vibe of the firm, made working at a boutique personal injury firm very enjoyable. Because it was so small, we could easily pop over to the offices of the firm's lawyer and paralegals if we had any questions or any information to pass on. All three summer students shared an office, which allowed us to easily work together and pool our knowledge when one of us ran into a problem.

The open-door policy, collaborative firm culture, and client interaction made the summer very enjoyable! This summer was a crash course Tn tort law, litigation, and personal injury claims. We are both very grateful for everything we learned and the experiences we had. There are many advantages to working at a boutique law firm for your first legal job, and our summers at NOVA Injury Law are a great testimony to that.

An Interview with Professor Steve Coughlan on Bill c-75

Weldon Times: Good afternoon, Professor. Thank you for sitting down to chat. Over the summer, Bill c-75 gained royal assent. There are numerous changes to substantive criminal law as well as criminal procedure contained in c-75. Can you tell us about your involvement with the bill?

SC: I was involved with a number of things. I had a number of telephone conversations with a variety of people in the Minister's office and the Department of Justice. I flew up to Ottawa to meet with some senior people in the Department of Justice, and with a few other academics, we discussed the kinds of changes that might be done, and ways in which academics might be involved in helping with that. The Minister was already conducting a number of round tables on criminal justice reform, and I think the fact that we were now kind of waving our hands at her and saying "you should be listening to us," led to academics being invited to most of the round tables across the country, and their voices being heard. In addition, we've had continuing behind the scenes conversations about particular issues along the way.

WT: Let's talk about the hybridization of offences. C-75 reclassifies a large number of offences from solely indictable offences to what are known as "hybrid offences." These offences can be tried either as indictable or on summary conviction. This change has drawn some criticism from politicians. What is your opinion on the change? Why was the change needed?

SC: I don't know that it was needed. I take it that it is intended as a delay reduction technique because if the offence is indictable, then of course the accused has got the election, and they might elect Superior Court. But if the Crown is proceeding summarily, then it's necessarily going to provincial court. The vast majority of trials take place in provincial court now, and provincial court tends to be quicker in dealing with things. So, presumably the notion was that this gives the crown the ability to decide: "I'm going to treat this as a summary conviction offence and we're going to get through the system more quickly." This change certainly creates the mechanism to do that. Now, that's no guarantee that that is in fact what will happen, of course. Crowns could still continue to treat these more-serious offences as indictable offences, in which case there will be no change.

But the other changes which have happened to all summary conviction offences will still be in place. Part of the package of this reform is not just that they changed some more-serious offences from purely indictable offences to hybrid offences, but also, as a consequence, the average seriousness of hybrid offences has gone up. Therefore, the average seriousness of things that might be treated as summary conviction has gone up. They've also changed the time limit on launching prosecutions for summary conviction offences. It used to be six months, now it's a year. They have also changed the maximum penalty for summary conviction offences. It used to be six months, now it's two years less a day. So, they have lumped in some formerly purely indictable offences as hybrid offences so that they are potentially summary conviction, and that has a potential benefit (that might or might not be realised), but the flip side of it is that for every summary conviction offence, it can be launched after a longer period of time and the potential penalty for the accused is four times what it used to be. So, there's definitely a trade- off there. If we do get the benefits of Crowns deciding to treat more-serious offences as summary conviction and speed up the system that way, perhaps it is a reasonable trade off – but there's a big "if" there.

WT: For jury trials, c-75 eliminates peremptory challenges and modifies the procedure for challenging a juror for cause. The elimination of peremptory challenges is controversial. Proponents of the change argue that it stops counsel from eliminating jurors for arbitrary reasons, but opponents of the change argue that peremptory challenges are an important safeguard against the inclusion of possibly bias jurors. How do you think this change will impact jury

trials in the future?

SC: It's definitely going to have a big impact, and I think it's important to look at it in light of one of the other changes: the role of the judge in the jury selection process. We can contrast those two. There's potentially something fundamentally shifting in our approach to jury trials here. Our approach to jury trials has always been that, presumptively, any person is a fit juror for any other person. That's been a very strong presupposition within our jury selection process and it's the exact opposite of the approach taken in United States. In the United States a person gets called for jury duty and everyone is thinking "you're probably no good, but let's check." Potential jurors in the US get questioned for a very long time until people are satisfied and say "okay, we will take you." So, jury selection takes a long time in United States. In Canada we take exactly the opposite approach. Some random person is called, and we think "yeah, they're probably good. If you think they're not, you prove it," and then we put severe obstacles in the way of proving it. So, we have a strong presumption that any person is a fit juror or for any other person. That is a reflection of our confidence in the general fair-mindedness of people.

On the other hand, we have recognised in the justice system over the past twenty-five years or so that that confidence in the fair-mindedness of people might be misplaced, especially when it comes to trials of Aboriginal people and people of colour generally. So, that particular rule – anyone can be a fit juror for anyone – has now become subject to an exception: unless there are possible issues of bias against the accused because of their race. So, we've allowed that exception to our general presumption that "anyone will do."

Other than that exception I just mentioned, because we've had this presumption that anybody will do, the strong principle on which our system has been built is randomness. We have always thought of a representative jury as a random jury. Representativeness has not meant "each characteristic in society is reflected on this jury, or every gender is equally reflected, every race is equally or is proportionally reflected." We have not only not meant that, we have explicitly rejected that. We have thought "representatives means randomness." Now, of course, peremptory challenges have always been difficult to reconcile with randomness because they allow the accused to eliminate from the jury a certain number of people. In the case of serious offences, twenty people can be eliminated, and if it's, say, three accused jointly charged with murder, that will be sixty people. Then the Crown gets another sixty because the accused had sixty. So, 120 people can be arbitrarily and individually removed from the jury pool. If somebody wants to exercise that power in a discriminatory way (either the Crown or of the defense), then these peremptory challenges completely overrides the principle of randomness. It's just not random. And if we have an accused, or for that matter a Crown, who thinks "well I want to make sure there are no visible minorities on this jury," in a lot of jurisdictions in Canada the number of peremptory challenges are greater than the number of people in a visible minority likely to have been among the jury pool, and so the power could be used to stop those people becoming part of the jury. There's no question that peremptory challenges could be used in that way. Now, whether that is in fact the way they are used, whether that happens significantly, or whether that is only a very minor percentage of the times that it is used, I don't think we really have that information available.

Here's the thing that I say we have to look at in light of this change: another way which the government has changed the Criminal Code is that the judge now has an additional standby power. Judges have always had a standby power which is kind of a halfway house between excusing someone and not excusing someone. Trial always begins with the judge asking the members of the jury pool "well, is there anyone who wants to be excused?" People sometimes want to be excused, and it might be a very good reason like they're having surgery on the day the trial begins. The judge is going to say, "that's fine, you are excused." However, the person might not have a very good reason at all. The reason might just be, "Well, that's the day of the Blue Jays home opener." The judge is going to say to that person "well that's too bad but you're not excused." Sometimes though, the person's got a reason that isn't obviously good enough but it's not bad either. They might have this big trip planned which they could reschedule but don't really want to. And the judge can say to that person, "Tell you what, you just stand by. We have like 400 people in the room here. I'll make you number 400. So, just stand by." The person probably won't get called, but if they do, the judge will decide then if the excuse is good enough. What Bill c-75 has done is given the judge an additional standby power. That is, the ability to have a person stand by not just for reasons of personal hardship, but for the purpose of "maintaining public confidence in the administration of justice."

WT: Okay, what does that mean?

SC: That's the difficult question! Clearly, they did this in response to the Gerald Stanley trial which is the case where it's believed the defence counsel was excluding Aboriginal people from the jury. This is the case that has led to peremptory challenges being taken out of the Criminal Code.

WT: Yes, I was going to ask about the Stanley trial, but you have beaten me to it!

SC: Right, and so it's clearly in response to that. The conclusion seems inescapable that it likely means the judge should be trying to make the jury more reflective of the community, or something like that. Maybe we've got a room full of people, half men and half women, but because we call them in random order, we've called twenty men in a row and we're getting a lot of men on the jury. So, maybe the judge is supposed to think, "Well, I'm going to stand by the next few men until we randomly call a woman." Maybe the judge is going to think, "Well, there are people who are visible minorities in this room but none of their names are being called randomly. So, I'm going to stand by the people who aren't visible minorities until we get some of those people who are visible minorities called." If that's what the change means, and it's hard to see what else it could mean given the impetus for it, then that's actually fundamentally at odds with our notion that jury representativeness means randomness. It is actually directing the judge to interfere with randomness to achieve a version of representativeness which has been explicitly rejected in the case law about juries up until now.

WT: So, if that's really the purpose, then it wouldn't it make more sense to just create a statute that says the jury must be representative of the social and cultural make-up of the community? But, as you have said, that is in conflict with the case law.

SC: Yes, right. So, it might be that we're seeing a shift here because, of course, you know Parliament can change the approach that we've taken, and the court will respond to what Parliament does. So, although the court has said that representativeness means randomness and does not mean trying to actively reflect every kind of membership in the community on the jury, if Parliament clearly says, "No, representativeness means reflecting societal make-up now," well then that's what courts will start doing. Now, it looks like that's what the change to the Criminal Code is doing, but it's not clear. So, I think it's actually going to be a real dilemma for judges who are dealing with jury selection to try to work out what to do. Do I, as a judge, keep doing what the Supreme Court of Canada has very clearly directed me to do or do I start doing what Parliament has kind of hinted but not clearly said to do?

WT: So, this is going to be a live issue? It's going to be one to watch.

SC: I think so. I don't think it's been much observed in all the commentary on c-75, but I think it's got real potential to cause confusion.

WT: We have discussed some of the notable changes c-75 makes to criminal law and procedure. What is the most important or likely-influential change in your opinion? Are there any other important changes that you think our readers should be aware of?

SC: Yes, I think the biggest change in c-75 is arguably the best one. It's one we haven't talked about yet. It is the concept of administration of justice offences and the creation of this new thing called a "judicial review hearing." I think the rationales for this, there are several of them, all come together to make this a really clever idea.

One of the problems already talked about in the criminal justice system is trial delay. Trial delay is partly caused just by volume of work. Roughly 20% of cases in the criminal justice system are people violating bail conditions, people who were supposed to show up on a particular date for trial but missed the trial date. There are separate offences in the Criminal Code for these kinds of actions and those people are charged with a new offence. So not only are they charged what they were originally charged with, but they are charged with an additional offence as well.

As I said, about 20% of the total caseload courts are dealing with are those kinds of offences. In addition, those kinds of offenses have been particularly noted in a number of studies as one of the sources of Aboriginal overrepresentation in the criminal justice system. It becomes a kind of revolving door where you miss one court date and now, suddenly, you're one charge has become three charges. It becomes harder to comply with the conditions because they are stricter, and so now you're one charge has become seven charges. You eventually get to court and end up with a criminal record for seven things, or in some cases six things because you're acquitted of the thing you were originally charged with, but you're convicted of six offenses along the way.

It's a problem for everybody, but it's a particular problem,

a number of studies have identified, contributing to Aboriginal overrepresentation. And it's unnecessary because the reason that we're prosecuting people for these sorts of things is really just as a way of trying to make them comply with the conditions, and make sure they show up to court on time. These kinds of offences are not like theft, assault, or most criminal offences. This is why c-75 has created this concept of administration of justice offences. The idea being that we told you to do something and you didn't do it.

WT: So, it's not quite below the "don't be a jerk line?" A phrase I'm sure your 1L class will soon come to know.

SC: Right yes, at least it isn't often below that line. It might be that we can get you to start complying with your bail conditions in some other way than actually charging you with an offence for failing to comply with your bail conditions! Maybe we just need to reconsider your bail conditions. All we are really trying to do is make sure people comply with conditions of their release. We can do that without charging them with an offence for failing to comply. So, the government has created this notion of administration of justice offences, and they've created the concept of a judicial review hearing which is a way to deal with these kinds of breaches which does not involve laying an additional charge. I think that for everybody that's good because these are relatively minor offences, that probably should not have been criminal in the first place now won't be charged, and this ought to have particular benefits for Aboriginal people as well. It should also remove a significant portion of that 20% caseload which will allow the system to operate more efficiently as well. So, the notion of administration of justice offences and judicial review hearings, once that gets into full swing, I think is something with real promise.

WT: So, are these administration of justice offences some kind of regulatory offence?

SC: They're not really offences at all. The person who fails to comply gets called to a judicial review hearing and the judge in the judicial review hearing can do a number of things, such as drop the problematic condition, or keep it exactly as it is, or even make the conditions stricter, but without dealing with it as an offence. Now, the original offences haven't been removed, so it's possible to still charge someone, but c-75 creates an alternative to charging them. We are just trying to get people to comply without using criminal sanctions.

The Weldon Times would like to thank Professor Coughlan for graciously making time to speak with us. To read the full interview visit weldontimes.com

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Supreme Court Briefing

FALL DOCKET | SEPTEMBER-OCTOBER

K.G.K. v. Her Majesty the Queen

Relevance – Constitutional Law | Charter Rights | Trial Within a Reasonable Time | Manitoba | Criminal | As of Right

The SCC is set to hear an important case on post-*Jordan* jurisprudence. The issue is whether a trial **judge's decision-making time** is to be calculated within the ***Jordan* ceiling**, as an overall delay for the purposes of s. 11(b) of the Charter. The appellant submitted a motion to stay proceedings on the grounds of delay the day before the verdict was to be delivered. The appellant argued that the nine months of the judicial decision-making time ought to be included in the Jordan ceiling. The motion judge dismissed the motion, holding that the proper test for whether judicial decision-making time breaches s.11(b) is if the delay is "shocking, inordinate and unconscionable" (*Rahey v R*, [1987] 1 SCR 588). The Court of Appeal was split on the issue. One Justice of Appeals agreed with the motion judge whereas the justice concurring in result held that while judicial decision-making time should not be included in the presumptive ceiling set by the Jordan framework, a separate approach from *Rahey* is needed. Finally, the dissenting justice held that judicial decision-making time must be included in the presumptive ceiling.

Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, et al. v. Her Majesty the Queen in Right of the Province of British Columbia, et al.

Relevance – Constitutional Law | Charter Rights | Minority Language Educational Rights | British Columbia | Civil | By Leave

The appellants are the French-language school board and representatives of francophone parents in British Columbia, and they alleged that the Province of British Columbia **infringed the minority language educational rights** guaranteed by s. 23 of the Charter by **underfunding** the French language education system. The trial was extremely lengthy and the trial judge's decision was one of the longest in Canadian history (totalling 6,843 paragraphs). The appellants were successful in part and were awarded costs stemming from the provinces failure to adequately fund a transportation system for francophone students. The judge nevertheless declined to award the substantial portion of the costs sought despite finding numerous unjustified s. 23 infringements. The appellants appealed and the province cross appealed. The court of appeal dismissed the appeal but allowed the cross appeal.

David Matthews v. Ocean Nutrition Canada Limited

Relevance – Employment Law | Constructive Dismissal | Good Faith | Nova Scotia | Civil | By Leave

This case concerns whether the SCC decision in *Bhasin v Hrynew* widens or changes the **good faith principle** in contractual dealings. The appellant employee and Respondent employer had agreed to an incentive plan, in which the respondent would pay out the appellant a percentage of the profits if and when the respondent sold the company. The appellant resigned from his position in June 2011 and brought a suit for **wrongful dismissal** against the respondent. The following month, the

respondent sold the company. The total payout to the appellant had he still been employed at the time of sale, would have been $1.1 million. The appellant successfully brought a claim of wrongful dismissal against the respondent and was awarded $1.085million in damages, most of which stemmed from the incentive plan. The court of appeal, however, reduced this amount substantially. In their decision, the court of appeal noted that the incentive plan had a clause that excluded someone benefiting from the plan if they either resigned or were fired (with or without cause) before the company was sold. The dissenting judge held that the actions of the respondent, which forced the appellant to resign, were the very type of dishonest actions contemplated in *Bhasin*. Subsequently, the dissenting judge would have dismissed the appeal.

Javid Ahmad v. Her Majesty the Queen

Relevance – Criminal Law | Defences | Entrapment | Ontario | Criminal | By Leave

This case, to be heard in tandem with *Landon Williams v Her Majesty the Queen* (appeal granted as of right), presents the SCC with an opportunity to clarify the law around the defence of **entrapment**— specifically, to clarify the elements of entrapment, the proper scope of a bona fide investigation, and the requirements for **reasonable suspicion** in a dial-a-dope investigation. Both cases involve a dial-a-dope investigation wherein the police, acting on a tip, called a phone number suspected of being used for drug trafficking. In order not to entrap an individual the police must have reasonable suspicion that the individual is engaged in the criminal conduct under investigation before the officer gives the individual an opportunity to commit an offence. In *Ahmad*, the trial judge found that the police had not gone beyond **legitimate investigative steps** in their phone conversation with the appellant and that they had grounds to form reasonable suspicion when the appellant asked the officer, "What do you need?" The Court of Appeal upheld the trial judge's decision.

In *Williams*, the trial judge held that the appellant was **entrapped** because the police did not have **reasonable suspicion** when they asked the appellant if he "was around." The officer testified that this phrase was used to ask if the appellant was available to deal drugs. The court of appeal disagreed with the trial judge: the majority held that the police, due to **previous investigation**, already had reasonable suspicion that the *phone line* was being used for drug trafficking. This suspicion, in conjunction with the appellant confirming his alias identity (which corroborated the information provided by the tipster), meant that the police had reasonable suspicion the appellant was selling drugs at the point in time the officer asked to buy the drugs.

1688782 Ontario Inc. v. Maple Leaf Foods Inc., et al.

Relevance – Torts | Negligence | Duty of Care | Ontario | Civil | By Leave

The appellant is the class representative of franchisees who had a contract with the respondent to exclusively purchase meat products from them. A listeria outbreak at the respondent's plants required product recalls, which resulted in shortages of the appellant's products. The appellant sued for damages resulting from these product shortages and from **reputational harm** caused by their association with the contaminated meat products. The motions judge concluded that the respondent owed the appellant a duty of care based on a previously recognized **duty of care** category: that of supplying a product fit for human consumption. Moreover, the motions judge held that the respondent should have been mindful of the appellant's legitimate business interests. The court of appeal overturned the motions judge's decision, holding that the aforementioned duty of care category applies between a manufacturer and a franchisee's customers, not between a manufacturer and a franchisee. The court held that the appellant's claim regarding a duty of care is actually based on a different footing: a duty of care to protect against reputational harm. The court held that the motions judge unwarrantedly extended the recognized category of supplying a product fit for human consumption to apply to

the reputational harm of a franchisee.

James S.A. MacDonald v. Her Majesty the Queen

Relevance – Tax Law | Taxation Legislation | Interpretation | Federal Court | Civil | By Leave

The appellant predicted that his shares in the Bank of Nova Scotia would decline in value over the coming years. He entered into a contract with TD Bank in which TD would pay him if his Bank of Nova Scotia shares dropped below a certain value by a set date. If the shares did not drop below the stated value, the appellant would have to make cash payments to TD. The shares did not decline in value and the appellant subsequently paid over $9 million to TD. The appellant took the position that the **payments counted as business losses** and were therefore deductible against income from other sources. The Minister of National Revenue took the position that the income did not count as a business loss. The federal tax court judge agreed with the appellant. The Federal Court of Appeal allowed the Minister's appeal holding that the appellant had created a hedge. Essentially, the SCC will rule on the proper test for determining whether a derivative instrument constitutes a **hedge** of an asset or liability.

Her Majesty the Queen v. Justyn Kyle Napoleon Friesen

Relevance – Criminal Law | Sentencing | Manitoba | Criminal | By Leave

The respondent pleaded guilty to sexual interference and attempted extortion. The sentencing judge handed down a sentence of six years' incarceration for each charge to be served concurrently. The respondent appealed this sentence on the grounds that the **length of time** was not justified because he was not in a **position of trust** to the complainant. The court of appeal allowed the appeal and reduced the sentence for the sexual interference to four and one-half years and for the attempted extortion to eighteen months, to be served concurrently. The Crown appeals.

National Inquiry into
Missing and Murdered
Indigenous Women and Girls

During the summer, the National Inquiry into Missing and Murdered Indigenous Women and Girls published its report. The Weldon Times is interested in hearing student's insights on the report's findings and implications. If you have an article you would like us to publish, please email Weldont@dal.ca

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