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

A Legal Look at the Wet'suwet'en Protests

Madison Ranta (1L)

The past few weeks have seen the relentless battle between colonial Canadian policies and the rights of Indigenous people brought to the forefront of the national consciousness. From protests stalling traffic on roads to blockades shutting down railways, actions in solidarity with the Wet'suwet'en people have transformed the Coastal GasLink project into a polarizing public debate on Indigenous rights. Some believe the Wet'suwet'en are exercising their rights to unceded territory and opposing a system of government forced on them by colonial Canada, while others see a small group of disgruntled rebels turning their community's problem into Canada's problem.

Much of the Wet'suwet'en's protest around the pipeline is an assertion of their legal rights to the land and their ability to self-govern. This piece will examine some of the legal arguments that have been made both for and against the Wet'suwet'en protests in an effort to dispel some of the misinformation and misunderstandings surrounding this issue.

Before going further, I want to acknowledge that I work to be an ally of Indigenous people but am not Indigenous myself. I learned many of the arguments I make later in this piece from Indigenous folks, such as Chelsea Vowel, Ryan McMahon, Jesse Wente, and others. They deserve credit in their tireless fights against colonialism and Canadian ignorance of Indigenous issues. I don't want to perpetuate the colonial tradition of settlers taking from Indigenous people to pass their knowledge off as my own original thoughts. At the same time, if I have misrepresented any of the following ideas, the error is mine.

History of the issue

The Coastal GasLink project is a billion-dollar pipeline meant to carry natural gas from northern B.C. to an export plant near Kitimat. Nearly 700 kilometres in length, the pipeline would cross the territory of 20 First Nations in the province. The company says they have signed agreements with the elected councils of all 20 First Nations, but the hereditary chiefs of the five Wet'suwet'en clans have repeatedly spoken out against the project.

The B.C. Supreme Court granted an expanded injunction to Coastal GasLink on Dec. 31, 2019. The injunction ordered the Wet'suwet'en to give Coastal access to the pipeline construction site. In response, the Wet'suwet'en hereditary chiefs issued an eviction notice to the company in January for violating their traditional laws.

The RCMP opened a criminal investigation when Coastal GasLink complained of finding downed trees and cans of gasoline near its worksite in early January. One of the Wet'suwet'en hereditary chiefs, Chief Na'moks (John Risdale), admitted that members of his clan had cut down the trees to construct barriers to protect against police raids.

On Feb. 3, the hereditary chiefs released a statement saying that they had filed an application for judicial review of the B.C. Environmental Assessment Office's decision to extend the environmental certificate for the Coastal GasLink project another five years. The chiefs argued that Coastal GasLink has a history of failing to comply with environmental regulations and had made no efforts to incorporate the findings of the Inquiry on Missing and Murdered Indigenous Women and Girls into their project. They found this concerning because "the inquiry found direct links between extractive industries, 'man camps' and increased violence against Indigenous women," according to the press release.

The hereditary chiefs also cited the Supreme Court of Canada's decision in *Delgamuukw*, noting that Canadian law recognizes Wet'suwet'en traditional governance, not just elected councils. By resisting the Coastal GasLink project, the hereditary chiefs

stated that they were resisting colonial violence and safeguarding the land for future generations.

Once mediation talks broke down between Wet'suwet'en hereditary chiefs and the B.C. provincial government, the RCMP moved to enforce the injunction against the Wet'suwet'en on February 6th. The Wet'suwet'en had set up blockade camps on the only access road to the Coastal pipeline construction site. The RCMP arrested multiple protestors who refused to vacate the area. Since this event, protests and blockades in solidarity with the Wet'suwet'en have sprung up across the country.

Legal issues

Rule of law

Many people who view the blockades and protests as a nuisance, from Twitter trolls to Conservative Party leader Andrew Scheer, have invoked the phrase "rule of law" in their arguments as to why the actions of the Wet'suwet'en land defenders and their nationwide supporters are unreasonable. These individuals acknowledge the legality of peaceful protest, but argue that Canada is a country of the rule of law and that the RCMP must dismantle these "illegal" blockades.

> *"The "rule of law" in Canada has always meant "colonial law" and has been subjectively applied to the detriment of Indigenous peoples."*

The "rule of law" in Canada has always meant "colonial law" and has been subjectively applied to the detriment of Indigenous peoples. Settler-colonial law is built on the illegitimate foundation of the euro-western legal concepts of *terra nullius* and the "doctrine of discovery." Indigenous nations practiced their own legal traditions and systems of governance in this land long before settlers arrived and imposed their way of life on sovereign Indigenous communities.

Colonial Canada has used the law as a tool of oppression to benefit those in power. It was legal for the RCMP to steal children away from their families and force them to attend residential schools. Section 141 of the *Indian Act* made it a legal offence for Indigenous people to hire lawyers to fight against unfair laws. Prior to the *Constitution Act*, 1982, it was legal for Indigenous title to unceded land to be unilaterally extinguished by the Crown. The "rule of law" is systematically stacked against Indigenous people.

Where were the discussions about rule of law during the "United We Roll" protests in 2019, where truckers from western provinces blocked traffic in downtown Ottawa to advocate for the oil and gas industry? Why were the RCMP not called in to monitor the recent protests of striking teachers in Ontario at the provincial legislature? In order to benefit ourselves, settlers pick and choose which laws to enforce and when. The idea that Canada is a country built around the egalitarian application of laws is a myth.

Unceded land

The Royal Proclamation of 1763 states that land not ceded or purchased by the Crown is reserved for Indigenous nations. The Wet'suwet'en Nation has never ceded nor sold their land, and are not covered by an existing treaty. Section 35(1) of the *Constitution Act*, 1982, recognizes and affirms existing Aboriginal rights, including land claims.

Elected and hereditary chiefs

Some who oppose the Wet'suwet'en protest have argued that the elected chiefs have agreed to let the Coastal GasLink project pass through their land. The system of elected chiefs is a colonial system forced upon Indigenous communities who had their own systems of governance, including hereditary chiefdoms, long before settlers arrived. As Kate Gunn and Bruce McIvor wrote in their February 13, 2020 article for *First Peoples Law*, most chiefs and councils are elected by status "Indians" whose names are on an *Indian Act* band list. The federal government decides who is able to be registered as a "status Indian." In addition, the fact that an Indigenous person is not registered under the *Indian Act* does not mean that they don't hold Aboriginal title and rights to land. Who can say that an elected chief is more legitimate than a hereditary chief?

It would also be a mistake to say that the elected chiefs have given permission for Coastal GasLink to pass through their land. The elected chiefs signed benefit agreements with Coast GasLink, not permission slips. The chiefs were not given veto power over the project. If you have no say over whether or not a project can proceed through your land, why not sign a benefit agreement and try to get something from it?

Conclusion

As I'm writing this, Wet'suwet'en hereditary chiefs are in ongoing negotiations with the governments of British Columbia and Canada. It's unclear how the conflict will be resolved. As we continue to watch Indigenous people fight for their rights to protect their unceded land, it's important to remember that Indigenous laws and systems of governance are legitimate. Aboriginal title to land is legitimate. It's not for colonial Canada to decide what should happen on that land. It's not ours to control. And neither are the people who live there.

> *"Indigenous laws and systems of governance are legitimate. Aboriginal title to land is legitimate. It's not for colonial Canada to decide what should happen on that land."*

Supreme Court Justice Clément Gascon

Justin Monahan (2L)

Supreme Court Justice Clément Gascon was admitted to the Quebec bar in 1982 and practiced for twenty-one years at Heenan Blaikie in Montreal. Afterwards, he served on the Quebec Superior Court from 2002–2012 and the Quebec Court of Appeal from 2012–2014. He was appointed to the Supreme Court of Canada in 2014 and, when he sat down for a phone interview with the Weldon Times on February 27th, was in the process of retiring from the Court.

Justin Monahan: *What first brought you to the study of law?*

Justice Gascon: That's a question I'm often asked, and I always come back to the same answer. Even if I try to look back in my memory, I cannot really find a better answer than this: it's always been in my mind, since I was in my early teenager years, that I would want to pursue a career in law. Not because we have a family of lawyers. As a matter of fact, my father was a doctor. But as far as I go back, in my early years in high school, this is simply what I wanted to do. And as I went along, that was the goal I had. So, I cannot really point to an inspiration except that this is something I always wanted to do.

And it's funny because I had three brothers, and we all ended up being lawyers, and we all married three attorneys. So, we went from zero to six.

JM: *Went from not enough legal help to maybe too much?*

JG: Yes, exactly—sometimes too much.

JM: *I'm from a similar situation: no one in my family practiced law. My father managed a car dealership and my mother was a nurse. But I found I was inspired by their dedication to client service. Did you find that same kind of inspiration from your father made you want to help people in your own way?*

JG: Well, definitely. He was in a situation where he was dealing with the patient. That was the reality of our childhood. Always, very much, the contact with people, with clients, the idea that you are there to bring a proper solution. I was a litigator, so you were always in a context where you were fighting to get things right and hopefully the proper solution for your client. So yes, it was indeed similar to what my father had been doing all his life in terms of helping his patients.

JM: *Two professions where people really don't want to see you, until they really do.*

JG: Exactly, exactly.

JM: *Starting your career, you practiced, researched, and taught many different areas of*

law. We're interested in knowing, as students, if you would recommend practicing in a niche area of the law or practicing in many different areas?

JG: Well, let's be honest: in a sense, if you make a decision to make your career in litigation, as far as I'm concerned, it is a specific area of the law. Let's face it, not all lawyers are litigators—in fact, far from it. And the organization in which I worked—and if I look nowadays, those megastructures that are national—you look at what they call their litigation department, and it's a pretty specialized area of the law and more limited than others. So, we tend to describe litigators as the generalists of the law, but in a sense it's a speciality on its own. So, I didn't regret that because I liked the fact that being a litigator, that's the way I saw the practice of law.

I think that anybody today who makes this kind of choice is focusing on something that remains pretty specialized. The reality in today's world is that you are developing more and more the concept of niches, even within litigation. And perhaps that's because of the complexity of the matters. And that's not necessarily bad. The challenge nowadays is that the world is evolving so fast that what can be a very trendy area of today may be very different not twenty or thirty years from now, but as short as ten years from now. This is one of the challenges of developing a niche nowadays: everything is moving and changing so fast. But I think you are seeing more concentration and specialization nowadays. I think that's the reality.

JM: *Specialization seems to be necessary to succeed in any one field.*

JG: And let's face it: the cost of lawyers nowadays, you can understand a client saying, "Well, if I have a problem in this area, I want a specialist. I don't want to pay to educate my lawyer in a specific area of the law."

JM: *You were called to the bar in 1982. What was it like coming up in the moment the* Charter *was coming into application?*

JG: That's interesting, because you may think when you look at it from a distance, that it had a major and game-changing impact in the practice of the law. But one has to bear in mind that it was a great accomplishment, but its application is in a context of the relationship between the state and the citizen. When you put it in the context of litigation, the field in which I was involved, it clearly doesn't have much of an impact. So, when it started, it was a new area. I wouldn't say that in the field in which I was practicing that it was necessarily the same game-changer that it was for criminal law or public law. Even at Heenan Blaikie these days, by ricochet, you could have some impact involving *Charter* issues, but when the *Charter* really began, you had to be involved in a public or criminal law setting to see the immediate impact.

JM: *Do you have any observations on the application of the* Charter *within the common law that we're beginning to see?*

JG: I think we're seeing developments in regard to the application of the *Charter* almost on a yearly basis. And the limit of the application will be the creativity of the lawyers in the arguments they bring. I don't think we've seen the end of the developments.

JM: *You've recently used your own experience with mental health to begin a discussion regarding mental health within the legal profession. What's it been like to participate in such a discussion?*

JG: I don't think it's necessarily accurate to say that I began the discussion. I think the discussion started a few years back. There's been a number of law societies and organizations over the last few years coming to grips with this issue, realize it is an issue, and that it would perhaps be a good thing to have an open dialogue in this regard. My own experience opened my eyes to this reality—that there is quite a lot there well before my own situation arose, where there was a useful and very good discussion. I think I have limited my discussion, for personal reasons, to the legal field and community. At some point I realized it could be helpful for law societies and law students to have some person speak to that in order to support a more open dialogue. And if I can contribute in this regard, I am happy to do so and to assist and help. But the last thing I want to be seen as is the center of the discussion. I don't think anyone should be at the center of the discussion. I think the issue should be at the center of the discussion.

> *"Now we realize that mental health is an important part of a proper equilibrium."*

It is something that the legal, as well as other professions, realize that they have to address. It's part of the reality, as many years ago we realized that physical health was something that perhaps we were not paying enough attention to. Now we realize that mental health is an important part of a proper equilibrium. There are quite a number of persons throughout this country that are making important contributions to this discussion. And I think the fact that the discussion is becoming more open—that is the most positive thing.

JM: *You're correct to say you didn't begin the discussion, but as law students we certainly appreciate that you brought your voice, which has brought a little more attention to this topic.*

JG: I appreciate it, but as I say to a number of groups, I think it's important that your generation takes and carries the ball. Because your generation is certainly less afraid than others to have an open discussion. Because there's no other way but to pay attention, because you're the future: you have to pay attention. The new generation of voices cannot be ignored.

JM: *Speaking of the new generation, as you know, law school is the beginning of many mental struggles. How would you encourage students, as they work through school and enter the work force, to begin with a more balanced lifestyle?*

JG: That is clearly not an easy balance because there are a lot of demands out there. There's a lot of competition out there, a lot of challenges, so I certainly appreciate that it is not easy to find a proper balance. But I think that the first point to start from is to be conscientious that it is important at some point to have this balance and not to brush it away as secondary. I think that just by being alert to the necessity of having a proper balance, to the fact that at some point, maybe for a few hours or a few days, that you need sometimes to just take a step back and recharge and realize that, like physical health, mental health is part of a proper equilibrium. I think that by just being conscious of that, you can end up with some good habits that would allow us to avoid the dangers of not paying attention.

The problem is when you start ignoring the signs or the potential problems. Then it comes to the point when it's very difficult to straighten things up. So, I think what I like about the dialogue that we are hearing today is that you are seeing a number of persons speaking to it, raising awareness, raising the necessity to pay attention, and just be there. To me it's a good way of leading to a better balance, a healthy life. I think it would perhaps be a bit unrealistic to think that we are going to switch from very, very hard-working weeks to starting at ten and completing at one. I don't think that's the reality. But if you are aware that it's an important element of your equilibrium, you pay attention and realize when you need a break. And take the break—and not simply forget about it and push and push until your system breaks down.

"But if you are aware that it's an important element of your equilibrium, you pay attention and realize when you need a break. And take the break—and not simply forget about it and push and push until your system breaks down."

There's no perfect recipe. Each person has their own strains, and their own ways of dealing with their challenges. And I think being alert, being aware, leaves you to the proper mechanism that works for you and would not necessarily work for everybody else.

JM: *It'll take, as you suggest, awareness from every student and lawyer, every law society, and even the law firms. Everyone will need to make a shift in perspective.*

JG: I think what we are seeing now—and I think what I see as quite positive—is that there is within the law societies and a number of law firms, is the fact that people are being more conscientious that it is simply not something you can brush away and ignore. The steps in order to deal with it will vary. It will obviously evolve as time goes by, but there is clearly better awareness about all these issues. And that's already, I think, a big step. But, unless I am mistaken, it seems to me that we are seeing more and more the fact that this reality is certainly not ignored.

The Weldon Times would like to thank Justice Gascon for graciously making time to speak with us.

Club Spotlight:
Dalhousie Feminist Law Association

Natasha Procenko and Paige Minicola (DFLA Executives)

Natasha Procenko (L) and Paige Minicola (R) in front of DFLA's "Who is Your Shero?" poster.

The Dalhousie Feminist Legal Association (DFLA) is a law society of about seventy active student members committed to principles of equality and feminism. Of the many initiatives DFLA organized this year, we are most proud of our Women's Week, which was organized in celebration of International Women's Day. The week's events covered a range of activities in the areas of peer education, student engagement, professional and leadership development, fundraising, and community involvement.

As the kick-off event for Women's Week, DFLA's mentorship program hosted a trivia night in collaboration with Women's Community Space to enhance education and knowledge about feminist issues. Local feminist businesses provided prizes to promote female entrepreneurship, members collected women's and children's clothing for local charities, and the DFLA hosted a women's hit karaoke night ("Karaok-She") in collaboration with the Weldon Karaoke Clinic to promote community and a space for female voices.

Also, as part of Women's Week, we organized a panel and presentation in collaboration with the CBA Law Student's section. Four female litigators discussed their experiences navigating the legal profession and provided advice and guidance on "claiming your voice and style." The panel provided students the opportunity to reflect on their own experiences of overt and covert sexism and the tools to respond to these instances in the future. During Women's Week we also collaborated with Law Hour to bring in Justice Anne Derrick of the Court of Appeal. Justice Derrick's well-attended talk focused on the role that her feminist advocacy played in her journey to the bench. Her discussion was inspirational to young law students who hope to continue a legacy of advocating for gender equality in the legal profession and beyond.

Finally, through our bake sale, we collected several boxes of menstrual products which will be given to local women's shelters. Monetary donations were given to the Elizabeth Fry Society, specifically the Record Suspension & Vital Statistics Clinic, which helps women with the costs of applying for a criminal record suspension.

> *"Our society serves as a tribute to the importance of feminism in the law and an invaluable reminder to the Weldon community that through collective action, law students can and do make a positive difference."*

DFLA is very proud of our accomplishments this year. Beyond our many achievements, the society has proved to be a sturdy foundation on which countless friendships and community partnerships have blossomed. Our society serves as a tribute to the importance of feminism in the law and an invaluable reminder to the Weldon community that through collective action, law students can and do make a positive difference.

2019-2020 Hong Kong Protests

Tiffany Leung (1L)

History

Hong Kong was a British colony from 1841—1997. In 1997, it was handed back to China. The two countries created a document titled "The Basic Law," which embodies the notion of "one country, two systems." In this document, China authorizes Hong Kong to maintain autonomy over its executive, legislative, and independent judicial power. It also promises that Hong Kong's "way of life" will not change for fifty years.

Extradition Bill

In February 2019, Hong Kong's Chief Executive, Carrie Lam, proposed a bill called *The Fugitive Offenders and Mutual Legal Assistance in Criminal matters Legislation (Amendment) Bill 2019.* As outlined by the Hong Kong Bar Association, this legislation would allow Hong Kong to extradite fugitives to countries with which it does not have formal extradition agreements. Notably, this includes China. The final decision on whether to extradite fugitives would lie in the hands of Lam.

The Hong Kong Bar Association noted that allowing Hong Kong to negotiate extradition requests with countries with which it does not have formal extradition arrangements may be detrimental. "One-off" agreements, as opposed to long-term agreements, do not incentivize Hong Kong to inspect the other country's practices to ensure surrendered fugitives will have minimum rights. Furthermore, critics fear that this bill will facilitate the erosion of Hong Kong's autonomy, as reported by *The Guardian*'s Verna Yu. And as observed by Fion Li, Carol Zhong, and Karen Leigh from *The Washington Post*, there is concern that China may abuse this bill by requesting the extradition of Hong Kong political dissidents.

Protests

Many protesters marched in the streets of Hong Kong to demonstrate their discontent with the bill. Such protests were met with resistance and frequently resulted in violent clashes between protesters and the Hong Kong police.

The protesters made five demands of the government. *The Guardian*'s Alison Rourke writes that their five demands include: (1) the complete withdrawal of the proposed extradition bill; (2) the government to withdraw the use of the word "riot" in relation to protests; (3) the unconditional release of arrested protesters and charges against them dropped; (4) an independent inquiry into police behaviour; and (5) the implementation of genuine universal suffrage.

> *"One-off" agreements, as opposed to long-term agreements, do not incentivize Hong Kong to inspect the other country's practices to ensure surrendered fugitives will have minimum rights.*

Anti-mask Law

On October 4, Lam invoked the *Emergency Regulations Ordinance*. The ordinance may be invoked when the Chief Executive believes Hong Kong is in a state of emergency or public danger, it and allows Lam to make any regulations she deems necessary to combat the emergency or danger. This includes amending an enactment or swiftly developing regulations with regards to arrest and detention. Using this ordinance, Lam developed an anti-mask law, called "*Prohibition on Face Covering Regulation*." . This law made it illegal to use masks during protests—with the exception of those who wore masks in the course of their employment, for religious reasons, or for health reasons. Those who violate this law without a valid exemption face fines and a prison term.

As Jasmin Siu reported in *South China Morning Post*, on November 16, the Hong Kong High Court ruled the anti-mask law as unconstitutional when invoked in times of public danger.

Police Brutality

Amidst the protests rose concerns about the Hong Kong police's manner of handling protesters. Amnesty International investigated how the police handled the protests and found several human rights violations. One important violation outlined is the excessive use of force by police when arresting protesters. According to the organization, the police's actions amounted to a breach of the United Nation Human Rights Office of the High Commissioner's *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. Namely, the police were in contravention of Section 5, which states that police should use proportionate force to achieve their objective, minimizing the harm done when possible. Public emergencies and political instability do not exempt officials from this section. The organization argues that the police displayed an unreasonable use of force towards protesters, evident in actions such as their frequent use of pepper spray. Amnesty International also uncovered other violations over the course of its investigation, including the arbitrary detention of protesters and delayed access to legal counsel for protesters.

International Responses

On November 27, 2019 President Trump signed two bills in support of Hong Kong. The *Human Rights and Democracy Act* allows the U.S. government to punish foreign government officials who are found to have committed human rights violations by freezing the officials' assets and ban their visas. The second bill bans the export of select U.S. ammunition, such as pepper spray, to the Hong Kong police.

> *"Amnesty International also uncovered other violations over the course of its investigation, including the arbitrary detention of protesters and delayed access to legal counsel for protesters."*

Prime Minister Trudeau issued an official statement expressing his concern for Hong Kong. He called for de-escalation and emphasized the importance of protecting the interests of Canadians in Hong Kong first and foremost.

Present Situation

The government formally withdrew the extradition bill on October 23, 2019, fulfilling one of the protestors' five demands. Additionally, on March 11, 2020, *South China Morning Post*'s Natalie Wong reported that opposition lawmakers are responding to Trump's *Human Rights and Democracy Act*. They have drafted a list of names of Hong Kong officials whom they believe to have committed human rights violations. Those listed include Chief Executive Carrie Lam and Police Commissioner Chris Tang Ping-Keung.

It remains to be seen how the U.S. will respond to this submission, as well as whether the other four demands of the protesters will be met in the near future.

LEGAL NEWS BRIEFING: Spring Edition

Coronavirus Outbreak

In response to the **coronavirus outbreak**, several jurisdictions have implemented or plan to implement legislation to curb the outbreak and prioritize the health of its citizens.

In the **United States**, the *H.R. 6201: Families First CoronaVirus Response Act* bill passed in the House and the Senate. The bill includes free testing for the virus, paid emergency sick and medical leave, and funding for food for low-income Americans affected by the virus. The Trump administration has also imposed a travel ban: any non-U.S. citizens who have been to select European countries are not allowed to enter the U.S.

On March 14, Prime Minister Boris Johnson stated that the **United Kingdom** plans to implement emergency legislation soon, including banning large public gatherings and giving police authority to detain those they suspect are infected by coronavirus.

People entering **Australia** must self-isolate for 14 days, and if they fail to comply with this rule, they will be fined.

Canada has announced a 10-billion-dollar stimulus package is in the works for small and medium size business to help offset the financial effects.

Protecting America's Wilderness Act

On February 12, the American House of Representatives passed bill *H.R. 2546 - Colorado Wilderness Act of 2019 [Protecting America's Wilderness Act]*, and it was received by the Senate on February 13. The bill was sponsored by Diane DeGette and first introduced in May 2019. The Act names various lands in Colorado and requires that the lands be handled in accordance with the *Wilderness Act*, an act that focuses on the **preservation of wilderness areas**.

Quebec "Dangerous Dog" Legislation

On March 3, Quebec's *An Act to promote the protection of persons by establishing a framework with regards to dogs* took effect. These provincial regulations require veterinarians, physicians, and others to report **injuries caused by dog bites**. The dog may then be evaluated by a veterinary surgeon to assess its condition and level of threat. Depending on the results, the owner may be **fined or forbidden from owning a dog**, or the dog may be euthanized.

Matrimonial Property Act

The *Matrimonial Property Act* in Nova Scotia may soon be amended. Justice Minister Mark Furey recently sought public input on the proposed changes to this Act. The proposed changes emerge from a report published by the Access to Justice and Law Reform Institute of Nova Scotia. Some changes include considering **common law couples as part of the matrimonial property scheme** and recommending that family property legislation include all domestic contracts, including marriage contracts and cohabitation agreements. The public feedback received by February 20, 2020 will be used to inform the government on how to reform the Act.

Change Name Act, 1995

On February 18, 2019 an **amendment** to the *Change Name Act*, 1995 came into effect in Saskatchewan. The *Change Name Act*, 1995 allows one to legally change one's or one's child's name. The amendment requires that anyone over the age of eighteen must have a **criminal record check**. As per the amendment, if this person is listed in the National Sex Offender Registry, his or her request for a name change may be rejected.

Harvey Weinstein Extradition

On March 11, the District Attorney's office of Los Angeles stated that it was in the process of **extraditing Weinstein** to face further **charges of sexual assault**. No arraignment date has been set yet. This extradition-in-process arrives after the Manhattan Criminal Court sentenced Weinstein to twenty-three years in prison on charges of sexual assault and rape on February 24, 2020.

Employment Standards Act Amendments

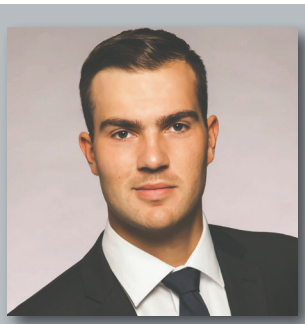
On March 3, 2020, The British Columbia Ministry of Labour introduced a bill to amend the *Employment Standards Act*. This bill proposes to provide **paid leave for victims of domestic and sexual violence.** The proposed amendments come in the wake of feedback submitted by over 6000 British Columbians, consultations with stakeholders, and written submissions from various groups. Currently, the Act allows for victims of domestic and sexual violence to take up to ten unpaid days off and fifteen weeks of unpaid days off from work. With the amendments, victims will receive **five paid days off**.

Bill C-7

On February 27, the *Act to amend the Criminal Code* (**medical assistance in dying**) passed its second reading in the House of Commons. The bill was jointly proposed by the Minister of Justice and Attorney General of Canada, the Minister of Health, and the Minister of Employment, Workforce Development and Disability Inclusion. It was developed in response to *Truchon v. Attorney General of Canada*, where the judge ruled that Medical Assistance in Dying's ("MAiD'") requirement for "**reasonable foreseeability of natural death**" **violates Sections 15 and 7 of the Charter.** The new bill proposes to remove this requirement. It will offer new safeguards to those whose do not fulfill the criteria of reasonable foreseeability of natural death. The bill also proposes to include those who suffer solely from mental health as fitting within the criteria of MAiD.

Bill C-6

Bill C-6, also known as *An Act to amend the Citizenship Act (Truth and Reconciliation Commission of Canada's call to action 94)*, has passed its second reading in the House of Commons on February 24. This bill was sponsored by Marco Mendicino. If passed, this bill will amend the *Citizenship Act* by including in the **Oath or Affirmation of Citizenship an acknowledgment to honour Aboriginal and treaty rights.** The bill was developed in response to the **Truth and Reconciliation Commission of Canada's call to action 94**: "We call upon the Government of Canada to replace the Oath of Citizenship with the following: I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada including Treaties with Indigenous Peoples, and fulfill my duties as a Canadian citizen."



Is Bill C-5 Unconstitutional?

Micah Boyes (2L)

Bill C-5: *An Act to amend the Judges Act and the Criminal Code* was tabled in the House of Commons on February 7, 2020. This legislation has bipartisan support. The new bill is substantially similar to Bill C-337, which was introduced in 2017 as a Private Member's bill by then-interim Conservative Party leader Rona Ambrose. While the Conservatives blocked Bill C-5 from being fast-tracked, they did so because they wanted to expand the bill to cover parole board appointees, a pressing topic following the murder of Marylene Levesque, who was a sex worker allegedly slain by a convicted murderer on day parole.

Given its wide-ranging Parliamentary support, it seems just a matter of time until the bill becomes law. However, critics question its constitutionality and appropriateness.

The bill amends S.3 of the *Judges Act* to require candidates for positions in provincial superior courts agree to participate in continuing education on sexual assault law and its social context. The bill also imposes rules upon the Canadian Judicial Council in how it develops mandatory judicial seminars on the topic. The bill even goes so far as to mandate that the Council must submit a report to Parliament including a description of each seminar's content, the dates it will occur, and the number of judges who will attend.

The bill also amends the *Criminal Code* by requiring that judges provide reasons for decisions in sexual assault proceedings. According to the Department of Justice website, the amendments made by Bill C-5 are intended to improve the public's, as well as sexual assault complainants', confidence that the courts will decide sexual assault cases in accordance with the law and without relying on myths and stereotypes.

Criticism of the bill, such as Gib van Ert's article in *MacLean's*, recognizes a clear need for judicial education on sexual assault trials. Despite their unacceptable nature and Parliament's efforts to erase them, harmful rape myths and stereotypes still exist. When courts rely on these unacceptable rationales, it discourages victims from reporting crimes. So if parties agree that the training is objectively a good thing, what are the arguments against it?

According to van Ert, the problem is not the training *per se*, but the fact that it is government mandated. Judges must be independent from the government, as Section 11(d) of the *Charter* states that any person charged with an offense has the right to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal.

> *"[T]he problem is not the training per se, but the fact that it is government mandated."*

That judges should be trained appropriately before conducting sexual assault trials does not seem controversial. But once Parliament decides that training judges is a legitimate method of achieving desired results, where should the line be drawn? Slippery slope arguments such as this are not particularly persuasive, but it is a worthwhile thought experiment. Suppose Parliament decided that climate change was such an existential threat that judges required

training in order to decide environmentally-focused cases. Many would welcome that change, but then suppose there was a government which identified law and order or the economy as the outstanding issue of the day. Parliament has no shortage of issues it may one day believe are important enough to require judicial training. At what point does it become inappropriate for Parliament to legislate training? Van Ert's suggestion is that the list of potential training points existing at all is problematic, as it implies that governments of the day can instruct judges.

The Canadian Judicial Council has also voiced concerns regarding the proposed bill. On February 5, two days prior to the tabling of Bill C-5, the Council released a statement entitled "Judge-Led Training Strengthens Confidence in the Canadian Justice System." The statement observes that sexual assault trials are conducted differently today than in the past and that judges now have tools to keep harmful myths and stereotypes out of the courtroom. The Council acknowledges that Bill C-5 has a laudable goal but asserts that holding training seminars and publishing summaries of the seminars are exclusively within the purview of the judiciary.

Judges are markedly different from average public servants, who must carry out government's bidding. Judges are often called to hold governments accountable. In sexual assault cases, the Crown is one of the parties. Essentially, the government is legislating judges receiving specific training on how to preside over cases involving the government, which will potentially result in more convictions. This will raise the question of whether Bill C-5 entrenches upon judicial independence and deprives those accused of sexual assault of their S.11(d) rights.

Despite its laudable goals, Bill C-5 puts courts in an awkward place. The constitutionality of the bill will almost certainly be challenged, which means that the judges mandated to receive the training will also decide whether it is constitutional.

The constitutionality of any bill is decided on whether its language is inconsistent with the Constitution. However, the larger question judges will be asked to answer is: How much direction will the courts accept from the legislative and executive branches of government?

In Defence of Dershowitz

Anthony Buckland (2L)

With the conclusion of President Trump's impeachment, we can now reflect on the arguments made during the proceedings. Most of the arguments were not particularly informative despite the great opportunity impeachment presents for discussion on American constitutional issues. However, one argument should be of great interest to lawyers and law students alike.

Alan Dershowitz, as part of the President's defence, argued that in order to impeach a President, the conduct charged must rise to the level of a "crime or crime-like" behaviour. The articles of impeachment (abuse of power and obstruction of Congress) do not allege such behaviour; therefore, the Senate should acquit the President.

The above argument—an example of *modus tollens*—is logically valid, so opponents need to deny one of the premises in order to rebut the argument. In what follows, I suggest, in line with Dershowitz, that both of the premises are sound, and so the Senate ought to (as they did) acquit the President. That being said, although I present some of Dershowitz's argument, this article is no substitute to reading the actual argument itself, which I would suggest is far more compelling than what I present here.

Premise 1: The Conduct Charged in the Articles of Impeachment Must be a Crime or Crime-like

a) The Textual Argument

Section 4 of Article II of the United States Constitution reads, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." Statutory interpretation starts with the plain meaning of the statute. The fact that the word "crime" is present in this section is a big indicator that what is required here is a crime, or something akin to criminal behaviour.

That the section reads "Treason, Bribery, or *other* High Crimes and Misdemeanors" (my emphasis) is also important. The term "other" indicates that the high crime or misdemeanor needs to be comparable in seriousness to that of treason or bribery—"other" is used as a qualifying term. If this wasn't the case, then the word "other" would be superfluous, and redundancy is something legislative documents do not contain. This shouldn't come as a surprise since this is simply an application of *noscuiter a sociis* (as Dershowitz rightly points out).

Other sections of the US Constitution support the claim that impeachable offences must be criminal. The presidential pardon powers in Article II of the Constitution give the President the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Dershowitz, citing Justice Benjamin Curtis in the impeachment hearings of President Andrew Johnson, points out that this sentence implies that impeachment is an offence against the United States. Is it possible to do a non-criminal action that amounts to an offence against the United States? I doubt it. In short, an impeachable offence is an offence against the United States, and an offence against the United States has to be a criminal offence.

Similarly, Article III section 2 states that "the trial of all crimes, except in cases of impeachment, shall be by jury." *All crimes, except in cases of impeachment* likewise implies that impeachment requires a crime.

Standard statutory interpretation leads to the conclusion that impeachment requires a crime or criminal-like behaviour, significantly narrowing the scope of impeachment.

b) The Historical Argument

Dershowitz's second prong of attack is to demonstrate that, at the time of the drafting of the Constitution, non-criminal grounds for impeachment were rejected. I have

not been able to verify each of Dershowitz' historical claims. However, no one has objected to his claims, so I have taken his historical claims to be accurate.

At the outset, Dershowitz points out there is a logical distinction between having reasons for the impeachment power generally versus the criteria for impeachment itself. He suggests that the Founders had many reasons, including possible presidential abuse of power, for including an impeachment power in the Constitution. Nevertheless, these reasons were not put forward by the Framers as a criterion satisfying the implementation of the mechanism of impeachment itself.

He argues that the Framers wanted something specific and defined as the grounds for impeachment. After rejecting a host of suggestions such as "malpractice, neglect of duty, malconduct, neglect in the execution of office, and maladministration" as being too vague, the Framers settled on "other high crimes and misdemeanours." He even claims there was some reservation regarding whether "misdemeanours" would be used by Congress and the Senate to capture non-criminal conduct, and that it was this reservation that lead to the Federalist No. 65 and No. 66 papers, wherein Alexander Hamilton discusses if SCOTUS should hear impeachments rather than the Senate.

Another historical example Dershowitz discusses in support of his position that impeachment requires a crime or crime-like behaviour is the addition of the 25th Amendment. That is, the reason there is no impeachment for presidential incapacity is precisely because incapacity isn't a crime or criminal-like behaviour. However, this argument is *prima facie* weak. There could be a whole host of other reasons for why impeachment isn't used for presidential incapacity: administrative expediency or not wanting to imply any moral condemnation, to name two.

A stronger historical narrative to support Dershowitz's position is, as he indicates, that criminal law texts clearly define misdemeanour as "a species of crime." As such, the term misdemeanour cannot mean anything but criminal conduct.

In my opinion, the strongest historical argument to support impeachment requiring at least behavior akin to criminal conduct is, ironically, a passage from Hamilton often cited in support of impeaching on non-criminal grounds. In Federalist No. 65 Hamilton says:

> "A well-constituted Court for the trial of impeachments is an object not more to be desired, than difficult to be obtained in a Government wholly elective. The subjects of its jurisdiction are those *offences which proceed from* the misconduct of public men, or, in other words, *from* the abuse or violation of some public trust" (my emphasis).

My reading of this quote, which is different from Dershowitz's but nevertheless supports his position, is that "The subjects of its jurisdiction" refers to the jurisdiction of the Senate when it is sitting to try an impeachment. That is, what "subjects" should the Senate be trying when it hears an impeachment? Those *offences* which *proceed from* the misconduct of public officials or from the violation of some public trust. It seems that the Senate isn't supposed to be sitting to try the abuse or violation of some public trust itself, but rather, the Senate is supposed to try *the offences that proceed from this violation*. It follows then, that if no offences against the United States proceed from such a violation, then the Senate should not be sitting to try impeachment. As Dershowitz says, "Hamilton was not expanding the specified criteria to include as independent grounds for impeachment, misconduct, abuse, or violation. If anything, he was contracting them to require, in addition to proof of the specified crimes, also proof that the crime must be of a political nature."

c) The Normative Argument

The final argument in support of the view that impeachment requires a crime or criminal-like conduct, which Dershowitz does not offer, revolves around how impeachment ought to function. Should congress really be allowed to impeach for whatever they like? As Dershowitz points out, the idea that the President serves at the pleasure of the legislature was specifically rejected by the framers of the Constitution. The very thing they didn't want was to have a British parliamentary-style system like the one they just broke away from.

Impeachment is supposed to be a serious proceeding, not a political tool to be used by the opposition when they disagree with the current President. Impeachment is a check and balance, a tool ensuring integrity of government, to be used only when the actions of the President impede the proper functioning of government. It is not supposed to be a tool of tyranny by the majorities of Congress and/or the Senate.

d) Objections to The First Premise

There are some popular objections against this first premise. Some objections fail on the grounds

of irrelevancy or fallaciousness—for example, that Dershowitz has changed his position from his defence of Bill Clinton, or that the *current* majority of legal scholars don't accept his argument. The former doesn't address the content of the argument and is *ipso facto* irrelevant, the latter is a fallacious appeal to authority (one that may not have been true in the latter half of the 1800's).

A better objection is that US Supreme Court jurisprudence establishes that Congress does, in fact, have the power to determine what is meant by "high crimes and misdemeanours." In the 1993 case of *Nixon v United States* (regarding the impeachment of Federal Court Judge Walter Nixon), the US Supreme Court held that the House and Senate have complete authority to try impeachments. By extension then, the House and Senate have complete authority to decide what they are going to impeach for. It should be noted, however, that although SCOTUS was unanimous in the outcome of the case, the court was split on whether the House and Senate had authority over all aspects of impeachment, the worry being that the courts would be unable to review an impeachment conducted on arbitrary proceedings. As Stevens J said in his judgment: "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy' judicial interference might well be appropriate."

Another way to think about this, as suggested by Montreal litigator-turned-YouTuber Viva Frei, is that if there really were no limits on what Congress and the Senate could impeach on, then there would simply be no need to have the words "treason, bribery, or other high crimes and misdemeanours" in Article II of the Constitution. The Framers would have simply put "the President can be impeached on any grounds Congress and Senate want."

Therefore, it is debatable as to whether there is a textual or constitutional limit as to on what grounds a President can be impeached. It is unclear that Congress and the Senate have complete say as to what counts as "high crimes and misdemeanors." Constitutional interpretation, after all, is the domain of the courts.

It has also been argued that impeachments in the past have been on grounds of non-criminal conduct. This is certainly true. However, there have never been any convictions by the Senate on a ground that did not include some kind of criminal behaviour.

Finally, there is the argument that because there could not have technically been statutory crimes preceding the framing of the Constitution, the Framers could not have intended impeachment to respond only to criminal behaviour. Dershowitz, again citing Curtis J, argues that (1) the Framers anticipated certain criminal behaviour becoming statutory offences, and (2) certain common law crimes, which remained on the books many years later, could also be included as impeachable offences. However, as we will see below, abuse of power was specifically rejected as an impeachable common law crime.

Premise 2: The Conduct Charged in the Articles of Impeachment was not a Crime or Crime-like

Having established the first premise as sound, Dershowitz moves on to discuss the second premise: that abuse of power and obstruction of congress are not criminal nor criminal-like. I will tackle these individually.

a) Abuse of Power

Dershowitz argues that the allegation of abuse of power amounts to simple political rhetoric. He gives a long list of examples of presidents that have been accused of abusing their power. This list, to name but a few, includes George Washington, Abraham Lincoln, John Adams, Thomas Jefferson, Theodore Roosevelt, Franklin Roosevelt, and Barack Obama.

In order for abuse of power to be impeachable then, there must be some underlying criminal-like behaviour. Dershowitz continues—although labels like *quid pro quo* are thrown about—no amount of labeling turns lawful non-impeachable conduct into unlawful impeachable conduct. This is especially so since *quid pro quos* are essentially how foreign policy operates.

The position of the House Managers was that the requisite *mens rea*, if you will, is supplied by "whether the President's real reasons, the ones actually in his mind, are at the time legitimate." Dershowitz suggests the Framers never intended for a psychoanalytic approach to impeachments. However, even if we follow this reasoning, the external evidence is consistent with both the legitimate and illegitimate intentions President Trump may have had during his phone call with the Prime Minister of Ukraine. But barring some admission on the part of the President, you can't infer which is the "real reason" for action.

Finally, Dershowitz argues that abuse of power is synonymous with, or a species of, maladministration. Since the latter was specifically rejected by the Framers, the former would have been too. Abuse of power,

Dershowitz argues quoting Hamilton, is such a vague term that it would reduce the presidency to service at the pleasure of the legislature.

Put simply, abuse of power isn't a crime. Instead, it is a political allegation. Fortunately, when it comes to Presidents, the Americans have a mechanism to deal with abuse of power: an election.

b) Obstruction of Congress

Viva Frei once observed that if presidential action isn't criminal, then it's not an *abuse* of power but the use of power. This observation parallels Dershowitz's argument that obstruction of Congress, in this case, isn't a criminal offence either. The obstruction allegations came in response to Trump ordering members of his administration to not comply with congressional subpoenas. Dershowitz gives the following answer:

> "…it cannot be an obstruction of justice… for a President to demand judicial review of legislative subpoenas before they are complied with. The legislature is not the constitutional judge of its own powers, including the power to issue subpoenas. The courts were designated to resolve disputes between the executive and legislative branches and it cannot be an obstruction of Congress to invoke the constitutional power of the courts to do so."

A President acting within his or her constitutional authority (via executive privilege or application for judicial review) isn't committing a crime. The fact that Trump did this on a large scale is irrelevant because a lawful action does not become unlawful when enacted repeatedly.

Moreover, the obstruction charges suffer from the same vagueness problems as the abuse of power allegations. Both obstruction of Congress and abuse of power are, as Dershowitz points out, without standards. These allegations are open to partisan interpretation, which is exactly what the rule of law is not about. These allegations are better dealt with at the ballot box rather than through impeachment.

c) Objections

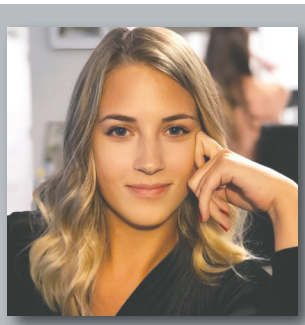
The main objection to the second premise argues that the allegations, or at least abuse of power, were common law crimes at the time of the Constitution's writing. Therefore, it is permissible to impeach on these grounds. The trouble with this objection, Dershowitz argues, is that abuse of power, though a common law crime at the time, was indirectly rejected as grounds for impeachment due to its synonymity with the rejected ground of maladministration. The Framers could have put maladministration, abuse of power and/or obstruction of congress in the Constitution, but they chose not to.

The 1812 US Supreme Court decision *United States v Hudson* stated that there are no common law crimes in the United States. Moreover, when the Framers drafted the Constitution, they rejected the inclusion of the common law crime of abuse of process. It follows that abuse of process was then ruled out as a ground for impeachment, and given the truth of the first premise of Dershowitz's argument, it is ruled out now as a ground for impeachment. I believe this argument applies *mutatis mutandis* to obstruction of Congress as well.

One final point before concluding: Dershowitz argues that crime-like behaviour is necessary to ensure impeachment is open in cases where the President commits a crime—bribery, for example—outside of the jurisdiction of Unites States law. It would not technically be a chargeable crime under US law since US law has no application outside of the its own jurisdiction. But the President could and should be impeached if the action was crime-like and would have been chargeable if committed within US jurisdiction.

Conclusion

I hope I have been able to clearly lay out the key aspects of Dershowitz's argument against impeachment on the grounds charged in the Articles of Impeachment of President Trump. Regardless of whether you agree with the argument, the opportunity to discuss this constitutional argument is one positive to come out of the impeachment saga.



Club Spotlight

Dalhousie Youth Legal Education Society

Erin Mitchell (Co-President)

The Dalhousie Youth Legal Education Society (DYLES) is a society at Schulich Law dedicated to teaching local (typically junior high) students the fundamentals of their legal rights. These include how to talk to the police, their rights and responsibilities under the *Youth Criminal Justice Act*, and how to deal with a cyberbully. We give presentations throughout the year and run fundraisers for the schools and their students.

In the fall of 2018, DYLES began a new pro bono project unofficially titled "The Consent Project" and officially known as "The Law of Yes." Following the tragic case of Rehteah Parsons as well as international examples of sexual violence, including Brett Kavanaugh, Brock Turner, and Harvey Weinstein, DYLES determined that there was a need for a discussion on consent in Halifax Regional Municipality (HRM) high schools. We began by reaching out to local high schools to determine their needs in this area. We were also hoping to learn what processes were already in place for complainants and respondents to sexual violence and harassment allegations within HRM schools. Dalhousie has a Sexual Violence Policy, so it seemed only right that high schools should have something similar. We were largely ignored in our efforts, or else met with distrustful administration who either didn't believe we were who we said we were or didn't want to give us any answers. By the end of the year, we had not received any interest from the high schools nor guidance on the needs of students. Aside from the shell of a PowerPoint presentation, the Consent Project was stalled for most of the 2018–2019 school year.

With September 2019 came new pro bono students and a fresh start. We immediately began reaching out to personal contacts, including former high school teachers and school nurses, and discovered there was indeed a need for us to come speak. Our presentation began to take form. Our approach was to focus on the law, relying on fundamental cases such as *R v Ewanchuk* and *R v J.A.*, while making the material approachable to the students. With maximum engagement in mind, we scoured the internet for clips taken from popular television shows and movies in order to spark discussion with the students. Remember that scene from "The Notebook" where Noah threatens to fall from a Ferris wheel if Allie doesn't agree to go out on a date with him and also INSIST that she wants to? Yeah, that doesn't age well. We found dozens of examples of non-consensual intimate acts across various films, books, and TV shows, so it's almost no wonder that young people are confusing sexual violence with romance and charm.

> "Our approach was to focus on the law, relying on fundamental cases such as R v Ewanchuk and R v J.A., while making the material approachable to the students."

We still have yet to do our first presentation, although we're getting close! Our hope is to have regular presentations happening annually in grade eleven and twelve classes across the HRM starting next year.

301 Wellington

Supreme Court Briefings

SPRING DOCKET | JANUARY 16 – MARCH 13, 2020

Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)

Relevance – Resource Extraction – Jurisdiction – Aboriginal Title and Rights

Quebec – Civil – By Leave

In the 1950s, a **mining project** began that spanned the traditional territory of the Innu, Indigenous peoples in Quebec and Newfoundland and Labrador. According to the Innu, the mining companies never sought permission to mine on their territory and prevented them from accessing their traditional land. The Innu sued the companies in Quebec court, seeking damages, an end to the mining project, and a declaration of **Aboriginal title**. However, there was **jurisdictional concern** over whether a Quebec court could issue a decision concerning the whole Innu territory, since parts are in Newfoundland and Labrador. The majority of the Supreme Court ruled that the Quebec court could decide the issue. They noted that Quebec courts have the power to decide cases where the defendant lives or is located in the province, and both mining companies are based in Montreal. However, a Quebec court decision couldn't make an order against the province of Newfoundland and Labrador.

Nevsun Resources Ltd. v. Araya

Relevance – International Law – Human Rights

British Columbia – Civil – By Leave

Nevsun is a **Canadian company** that owns the Bisha Mining Share Company in Eritrea. In constructing the Bisha mine, the company used Eritrea's National Service Program, where all Eritreans must participate in military training or other public service work when they turn eighteen. Workers who escaped as refugees claimed that they were forced to work in the mine for years under harsh and dangerous conditions and were barred from leaving. These workers sued Nevsun, arguing that it **contravened customary international law** by permitting **slave labour** to be used in building the mine. Nevsun cited the act of state doctrine and countered that Canadian courts couldn't rule on actions taken by another country. The majority of the Supreme Court decided that the act of state doctrine wasn't part of Canadian law, but the peremptory norms of customary international law were. The Court ruled that the workers' lawsuit could proceed.

MacDonald v. Canada

Relevance – Taxation – Contracts

Federal Court – Civil – By Leave

MacDonald used shares that he owned to help secure a loan from TD Bank. MacDonald also signed a contract with TD covering the shares, where he agreed to pay the difference if their value increased and TD agreed to pay the difference if their value decreased. The Canada Revenue Agency took issue with how MacDonald claimed these settlements on his income tax. He argued that he was using the contract to **speculate**, and so the payments should be deducted from his business income. The CRA argued that he was using the contract to **hedge**, meaning that the payments were capital losses. The majority of the Supreme Court ruled that the **purpose of the contract determines whether it is a hedge or speculation**. The more closely the contract is tied to the underlying asset, and the better it is at lowering risk, the more likely it is a hedge. The Court determined that the purpose of Mr. MacDonald's contract was hedging.

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