

ADVOCACY MATTERS



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EDITOR'S NOTE



EDITOR: PETER J. HENEIN,
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I'm tired. So tired. I. Just. Simply. Can't. Can't talk about it anymore. Can't engage. The election. The debates. The Donald. I can't and I'm not.

And in case I'm not being clear, and to avoid any doubt or possibility for a miscommunication (and particularly for those just starting your reading here and who missed the entire first paragraph), in the words of George W. Bush's dad, read my lips. And let me say for one last time. As emphatically, assertively, unambiguously, and as pointedly as I can that I am NOT writing an article about Donald Trump for this issue. Not going to acknowledge Donald Trump. Not going to make oblique references to Donald Trump. In fact, Donald Trump's name will not even appear at all. Not once.

No. I'm going to move on from Donald Trump. Because I'm done. Exhausted. Can't be moved by the fact that the election result hit America harder than seeing Bobby Ewing step out of the shower on the last episode of Dallas. Can't absorb the fact that the cabinet selection process is playing out like an episode of The Apprentice. I don't care if he appoints Snooki as Secretary of Defence (of America's right to party) or if he hires Jon and Kate Plus Eight to lead the charge in overturning Roe v. Wade.



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No. I'm not going to bite. Instead I'll write about things other than Donald Trump. Like litigation things. And administration of justice things. Things of import and relevance to the Canadian people. In a word... no Trump. This piece will be 100% certified Trump free.

And in the end. When this introduction is done, you will thank me for avoiding the US election entirely. For giving you some piece of mind. And, for greater clarity and without derogating from the generality of the foregoing, for scrubbing this piece of any references to Donald Trump.

Instead, I will do a heartfelt remembrance of Leonard Cohen.

Peter

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SCC Confirms Class Action Judges have a Ticket to Ride



TOM ARNDT¹, HIMELFARB,
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The Supreme Court of Canada² has concluded that provincial superior court judges in Ontario and British Columbia have jurisdiction to conduct hearings concerning class action lawsuits outside their home province. The Court found the source of such jurisdiction within the Acts that govern class action proceedings and in the inherent jurisdiction of superior courts.

Background

A settlement agreement was reached in 1999 in a multijurisdictional class action lawsuit concerning individuals infected with Hepatitis C caused by tainted blood supply. A term of the settlement was that decisions made by provincial courts in their supervisory role would only be effective if they were all made “without any material differences”.

Class counsel sought to have certain motions relating to the settlement agreement heard before Ontario, Quebec and BC superior court judges sitting together at one location. The proposal was intended to streamline the adjudication of the motion and

to guarantee that the courts would issue essentially the same order.

In Ontario, both the lower and appellate courts agreed that this jurisdiction exists, and found its source in the inherent jurisdiction of superior courts. However, as a condition to the exercise of this jurisdiction, a video link to the home province was required.

The BC Court of Appeal ruled that common law prohibited Judges from sitting outside the province at all. On appeal to the Supreme Court, all parties agreed that this jurisdiction exists so long as the provincial judges have personal and subject-matter jurisdiction over the parties and issues, but could not agree with regard to the source of this jurisdiction and what limits, if any, were to be imposed in exercising it.

SCC Decision

In writing for the majority, Cromwell J. considered a number of issues.

Should courts look to their statutory powers before considering their inherent jurisdiction?

Justice Cromwell noted that superior

courts’ inherent jurisdiction did indeed bestow a “residual” source of power. But he also concluded that this power ought to be “exercised sparingly”, and only after considering the courts’ statutory powers.

Ultimately, the jurisdiction of the superior courts of Ontario and British Columbia to hold out-of-province hearings could be found in s.12 of the *Class Proceedings Act* of each province. These sections grant courts considerable discretion to make “any order” with regard to a class action proceeding, so as to ensure a “fair and expeditious determination”. The exercise of this discretion was not an infringement on legislative power; rather, it operated to further the legislatures’ intent having regard to the underlying purpose of the Act, which was to provide and improve access to justice.

The Court also concluded that neither the common law nor the Constitution imposed limits on this jurisdiction. While there existed a “deep-seated sense” that provincial courts ought to limit their jurisdiction to their geographical boundaries, this did not apply in the instant case,

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1. As an articling student in the late 1990s, Tom Arndt acted in the Ontario portion of these class actions. Tom was a very small fly on the wall in the settlement negotiations. His observations from that time could fill a novel.

2. *Endean v. British Columbia*, 2016 SCC 42.

THE SCC SAYS...

which involved an adjudication on a paper record, precluding the exercise of so-called “coercive powers” (such as compelling the attendance of a witness) outside of the province in a way that could infringe on provincial sovereignty.

Do courts have jurisdiction quite apart from their statutory sources of power?

As the majority saw it, the wording of s.12 and the power it bestowed on courts was “reflective” of the inherent jurisdiction of superior courts. Where there were no statutory provisions permitting similar out-of-province hearings, the inherent jurisdiction of superior courts could be the source of the court’s power, so long as there no constitutional or statutory limitations on this power.

Does this jurisdiction require a video link to the home province?

According to the Court, there was no statutory or other limitation that required a video link to judges’ home provinces. The “open court” principle was not in issue where there

was a publicly accessible hearing, albeit held in another province. In other words, “open to the public” did not require the court’s physical presence in the province.

In his concurring decision, Wagner J. noted that while a video link was not a requirement for these hearings, the “open court” concept could potentially be violated by a decision to hold the hearing outside of the home province. He concluded that courts should generally grant requests by the public and the media for a video link to the home province.

Future Framework:

Once it had been established that a superior court judge had subject-matter and personal jurisdiction over the case, the SCC stipulated that the following factors should be considered in determining whether to hold a hearing outside a province:

- Whether holding a hearing in another province would be seen as imposing on the sovereignty of that province.
- A cost-benefit analysis that took into account fairness, the nature

of the proceedings, and the administration of justice. Factors to consider include the length and cost of the hearing, the imposition of burdens and costs on the parties, and the public interest in holding the hearing in the home province.

- What terms, if any, should be imposed, including costs considerations and video links.

While the Court declined to comment on cases that might involve the use of *coercive powers* by superior courts, Cromwell J. did opine that an overemphasis on sovereignty could lead to a dogmatic approach that ignored the increasing reality of legal issues and actions that “transcend” provincial borders. With that in mind, the judgment is careful to avoid language that limits the applicability of the decision to hearings within Canada. This leaves open the possibility of superior court judges conducting cross-border class actions outside of Canada. ▀
[November 3, 2016]



**The Advocates’ Society is honoured to present
the 2017 Advocates’ Society Medal to
Stephen Grant, Grant & Sadvari**



Donald Trump and the Rule of Law – can they co-exist?



SABRINA A. LUCENTI,
DOOLEY LUCENTI BARRISTERS
& SOLICITORS

An unbelievable political storm blew through the U.S. on November 8, 2016. In an historic election, the American people elected Donald Trump – the businessman-celebrity who has never held elected office, or any government office for that matter – as the next President of their nation.

During his campaign, Mr. Trump promised to do many things that most people thought were beyond his presidential powers, including vowing to order the attorney general to appoint a special prosecutor to investigate his opponent for criminal liability.

As he prepares to take the helm, will Mr. Trump make good on his pledge to his supporters to investigate Ms. Clinton? If he opts to exercise such power (whether granted to him by the Constitution or not), what does that mean for the rule of law in the U.S.?

Now, commentators have disagreed about the meaning of the rule of law. Some believe it to be a “rule” that gives the judiciary jurisdiction superior to that of the government. Others believe that the rule of law is merely an aid, albeit an important one, to interpreting legislation.

In either case, if we take the basic



principle that no one, no matter how powerful, is above law, what can we make of Mr. Trump’s threat to use the criminal justice system to “lock up” Hillary Clinton?

Rolling Stone columnist Bridgette Dunlap called Mr. Trump’s threat “an astonishingly open admission of his disregard for our legal system and fundamental constitutional principles.”¹ She also compared Mr. Trump’s thinking to that of dictator rather than the president of a nation of laws.

Laurence Tribe, Professor of Constitutional Law at Harvard Law School told Fortune:

Making threats or vows to use a nation’s criminal justice system against one’s vanquished political opponent is worse than terrible policy: it’s incompatible with the survival of a stable constitutional republic and, under our Constitution, would represent an abuse of power so grave that it would be an impeachable offense...²

The F.B.I. has now twice cleared Hillary Clinton of any criminal wrongdoing for the email fiasco. Director James B. Comey called Ms. Clinton’s actions “extremely careless”, but not criminal. Mr. Comey also said that “no reasonable

prosecutor would bring such a case [against Ms. Clinton].” Apparently, Mr. Trump disagrees.

Mr. Trump believes that if a portion of the U.S. population can’t see past what Ms. Clinton did, then she should be prosecuted for her actions – even if they’re not illegal. And if he so orders.

Of course, the president of the United States has no authority to order someone to be imprisoned.

However, this type of attitude, as Ms. Dunlap describes, does not represent “someone who respects the fundamental principle that the state can’t deprive a person of their freedom without being able to prove, beyond a reasonable doubt, that they broke the law.”

Indeed, it is quite the opposite.

President-elect Trump is constitutionally obliged to abide by and enforce the rule of law in his pursuit to make America great again. Unfortunately, his conduct during his campaign suggests that he is prepared to take liberties with the Constitution.

So, will President-elect Trump respect the rule of law when he moves from his corner office to the Oval Office? Only time will tell. ▀

¹ <http://www.rollingstone.com/politics/features/trumps-open-disdain-for-the-rule-of-law-w444093>

² <http://fortune.com/2016/10/10/donald-trump-special-prosecutor-hillary-clinton/>

Former Supreme Court Justices Binnie and Major Share Stories with the Calgary Bar

AARON RANKIN,
BENNETT JONES LLP, CALGARY



The Hon. W. Ian C. Binnie, C.C., Q.C. was the invited speaker at a cocktail party thrown by The Advocates' Society in Calgary on November 2, but guests got two former Supreme Court of Canada Justices for the price of one. (In fact, thanks to the generous sponsorship of Bentham IMF and MNP, price was not an issue for Society members.)

Mr. Binnie was warmly introduced to the crowd of 112 attendees by his former colleague, The Hon. John C. (Jack)

Major, C.C., Q.C. The two retired Justices of the Supreme Court of Canada spent almost eight years together on that Court and clearly recall those years fondly, such that neither could resist a few jokes at the other's expense.

Brad Berg, President of The Advocates' Society, was in town to encourage continued growth in the Society's Alberta membership. His remarks highlighted the Society's unique skills training programs and policy work. For his part, former Justice Binnie emphasized the Society's role in preserving a fundamentally oral tradition: the sharing of war stories leavened by a cathartic measure of griping. Former Justice Binnie shared three anecdotes in which embattled counsel made the best of a tough moment before the Bench with a quick-witted riposte. The selections might seem unexpected until one recalls former Justice Binnie's long and distinguished career as an advocate.

The entire evening was a fine example of the tradition about which The Hon. Ian C. Binnie spoke so warmly. ▀



(L-R) Bradley E. Berg, The Hon. W. Ian C. Binnie, Q.C., C.C., Peter J. Major, Q.C., The Hon. John C. (Jack) Major C.C., Q.C., Brian Foster, Q.C.



The Hon. W. Ian C. Binnie, Q.C., C.C. & guests

Twitter

Interview with Bernard Amyot, Ad. E. LCM Attorneys Inc., Montréal



1

Q: The greatest legal mind, other than yourself?

A: My mentor the late Louis-Philippe de Grandpré (formerly Justice of Supreme Court of Canada and CBA President) whom I met after he retired from the bench, whose analytical mind was second to none, synthesizing the most complex questions into a few key issues. And he did not suffer fools gladly.

2

Q: What keeps you coming back day in, day out?

A: Building LCM, our own new Litigation Boutique founded in the wake of the demise of Heenan Blaikie.

Q: When you're looking for inspiration on a file, you...?

A: Take a walk around the block and then... go see an exceptional associate...

3

4

Q: What gives you sanity?

A: My 2 children, or the younger generation generally (those who vote at least).

Q: What drives you to madness?

A: Millennials...

9

Q: Favourite courtroom in the country? Why?

A: The Quebec Court of Appeal main room upstairs in Montreal (1922-25), for revealing Montreal architect, Ernest Cormier's exceptional talent before he designed the Supreme Court of Canada building (1938-40).

5

Q: Favourite culinary indulgence?

A: A good cold crispy apple.

10

Q: What's the most important rule for you regarding email etiquette?

A: Draft an email the way you would carefully craft a letter. Pause before pressing "Send". No typos or abbreviations please.

6

Q: Favourite app?

A: App? Twitter?

11

Q: Work? Life? Balance?

A: It's like squaring a circle. Know your limits. Pace yourself.

7

Q: Pets or no?

A: No, allergies get in the way. That's my official excuse anyway...

12

Q: When you want to unwind, you...?

A: Read a good history book or political biography.

8

Q: Best album ever?

A: *The Future* by Leonard Cohen in English, and Jacques Brel's *Amsterdam* in French.

13

Q: What's the most ridiculous thing about being a litigator?

A: Always feeling the urge to win every single argument.

14

Q: In 7 words or less, please explain how the electoral college in the United States works...

A: It's a huge disaster, isn't it? ■

Fall Convention 2016 - Positivity and Hope in Uncharted Territory

LAUREN TOMASICH,
OSLER HOSKIN &
HARCOURT LLP



I reported on the wonder that is Fall Convention last year – which was my first foray onto this epic and unforgettable annual trip spent in the company of Canada’s finest litigators. I returned to Fall Convention in 2016 for another dose of collegiality, professional development, and obviously, with Fall Convention held in Sonoma Valley – wine! I’m delighted to once again report on my adventure.

The program was organized by Co-Chairs Wendy Berman, Joseph Markson and Megan Shortreed, and it was the perfect mix of cocktail and dinner networking opportunities, activities and CPD. Fall Convention 2016 had something for everyone, whether your passion and/or talent was wine tasting (the majority of us, as it turns out), cycling or hiking (some of us – see below), or the dance floor (Polley Faith wins on dance

floor talent hands down, with the rest of us exhibiting more passion than talent!).

A word to the wise, perhaps, is to stick to “organized” Fall Convention activities. A group of us that fancied ourselves as “advanced” cyclists (*i.e.* we thought we were too good for the “Sip ‘n’ Cycle”) rented road bikes from a local bike shop for a more intense ride through wine country. After a wrong turn, we found ourselves unable to complete our final climb before nightfall – meaning we were left without lights in pitch darkness at the top of a mountain with no shortage of hairpin turns. All joking aside, this was a very dangerous situation. Fortunately, the Sonoma Sheriff spotted us and took us back to the hotel, leaving us relatively unscathed and with an epic story - one that was particularly enjoyed by our dinner companions who marked our late dinner arrival with a standing ovation, and one that will no doubt become more epic when told at Fall Conventions to come.

Back to the organized activities! The CPD sessions were diverse and engaging. The Lightning Round was a fan favorite, providing – in record time – updates on case law developments that are critical to litigators. Sandra Barton managed to make limitation periods exciting, and highlighted that under the Ontario *Limitations Act*, discoverability requires a plaintiff to know that a

proceeding is the appropriate means to remedy the loss or damage. Michael Stephens assured us that the Supreme Court of Canada’s decision in *Bhasin v. Hyrnew* has not obliterated commercial certainty in contractual relations like some forecasted it would. This is the kind of stuff you email your colleagues back home about to prove that you’re not just in Sonoma drinking wine!

The Access to Justice panel featured the Honourable Justice Neil Wittmann, the Chief Justice of the Court of Queen’s Bench of Alberta and the Honourable Justice Laurie D. Zelon of the California Court of Appeals. These two judges from different jurisdictions shared a common sentiment – wait times for civil trials are worse than ever, but the initiatives to improve this within the profession gives reason for hope. And indeed, a prime example of this is The Advocates’ Society’s Best Practices for Civil Trials.

Fall Convention 2016 will stand out in our memories, travelling to the United States immediately following what was unthinkable just days prior – a US presidential election resulting in Donald Trump as President. This obviously weighed heavily on the minds of many and was a topic of significant interest, intelligent and lively discourse, and empathy.

Alice Huffman, the President of the California NAACP, gave a keynote address which took on



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special significance in the wake of the election. Ms. Huffman began her remarks by telling us that she had been in the midst of planning a victory party the night before the election when Megan Shortreed called her to discuss her upcoming speech. Ms. Huffman told us that she had joked with Megan about obtaining a Canadian passport if things went wrong. Ms. Huffman's victory party, unfortunately, did not happen, and her keynote address was significantly different than what she had planned as a result. But

rather than talking about what went wrong, her message focused on what is right in the broader picture. For example, she liked the name of our organization, The Advocates' Society, because in her view, advocating is one of the most important things you can do to make a difference.

In Ms. Huffman's powerful conclusion, she thanked Megan for her generous offer of a Canadian passport, but declined. Ms. Huffman is staying exactly where she is, because she still has hope, and she is going to keep fighting. These remarks, and their impact, as evidenced by the immediate and

lasting standing ovation, was spine-tingling.

In sum, Fall Convention 2016 brought much more than excellent sauvignon blanc. It brought much-needed positivity and hope in a time of concern and uncertainty. For example, good friends (and perhaps the local sheriff) are there to help you through a scary cycling incident. Many, like Ms. Huffman, have not lost an ounce of hope despite recent events in the United States. And, most importantly, we are part of a profession and an organization that is engaged and making a difference. ♣

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(L-R) Sandra L. Barton, K. Michael Stephens, Audrey Boctor, Marie-Andrée Vermette, Ranjan K. Agarwal, Anthony Moustacalis



Alice A. Huffman



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(L-R) Scott K. Fenton, Megan E. Shortreed, The Hon. Stephen T. Goudge, Jennie Chan



Day 2 CPD coffee break



(L-R) David Wright, Joseph J. Markson, Maureen Armstrong



(L-R) Jeffery G. Hewitt, Wendy R. Berman, David C. Nahwegahbow, IPC, LSM, Celeste Poltak, Andrew Lokan



Brad Berg toasts at the closing dinner



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