Session 3C – "Highlights of 2015 from *The Canadian Yearbook of International Law*"

Thursday, November 5, 2015

3:15-5:00 pm

Chair

John Currie, Vice Dean, Professor of Law, University of Ottawa

Speakers

Joost Blom, Professor, Allard School of Law, UBC

Gib van Ert, Executive Legal Officer to the Chief Justice of Canada

Charles-Emmauel Cote

Elise Hansbury, Lecturer at UQAM's International Clinic for the Defense of Human Rights and the Department of Law

Bernard Duhaime, Professor, UQAM

Reported by Jenny Poon

Professor John Currie began by introducing the speakers, stating that the discussion was focused on snapshots of Canadian law practice and emerging trends from the past year. Professor Currie introduced the *Canadian Yearbook of International Law* (the "Yearbook"), which have been published for more than 50 years. Professor Currie emphasized that the objectives of the Yearbook were to provide a forum for peer review journals, articles, notes and comments from around the world especially on international law affecting Canadians. Another objective of the Yearbook was to provide an accessible format for government and lawyers on the snapshot of Canadian legal practice and trends. The Yearbook has regular contributors which included annual contributions in particular areas of expertise. Today's discussion will be focused on the major developments in 2015 in the speakers' respective areas of expertise.

Professor Blom:

Overview:

Professor Blom's discussion centred on the development of two new cases in the Supreme Court of Canada, namely *Chevron Corporation v. Daniel Carlos Lusitande Yaiguaje* [2015] SCC 42 ("Chevron"), and *Equustek Solutions Inc. v. Jack* [2015] BCJ No 1193 ("Equustek"). According to Professor Blom, both cases concern the issue of jurisdiction, which changed in 1990 when the Supreme Court of Canada (the "SCC") told us that the jurisdiction of a provincial court was limited by the Constitution. For instance, either the defendant or the subject matter of the case need to have a real and substantial connection with the province.

Background of the Chevron case:

Both of the Chevron and Equustek cases dealt with this requirement but in different contexts. The Chevron case is a fascinating case with a long history of claims that was first brought in Federal Court of New York in 1993. After 9 years, the case was dismissed based on the fact that it should be heard in Equador. The defendant of the case submitted to the jurisdiction in Equador, where the judgment of $18 Billion USD was given to the Equadorian, but was lowered to $9 Billion USD on appeal 2 years later.

The Ontario action:

An action was started in Ontario to enforce the Ecuadorian judgment but the US Federal court in New York decided that the Ecuadorian judgment was obtained by fraud – which would make it unenforceable in the United States and in Canada. The Canadian courts, however, applied their own standards of enforceability and are notably willing to enforce foreign judgments. Chevron now wants to enforce the action in Ontario. The claim is against Chevron US, who are sued by Equaordian villagers. Chevron US has no presence in Canada. According to Chevron US, there is no jurisdiction over Chevron Canada because there is no real and substantial connection with Ontario. Chevron Canada argues that they are not Chevron US, so they are not liable on the judgment because their assets in the jurisdiction does not belong to the US.

The decision of the court:

At first instance, the motion judge agreed that there is jurisdiction over enforcement against Chevron US and Canada, but decided to stay the proceeding against the both of them. The Court of Appeal set aside the stay of proceedings because no parties requested for a stay, instead, the only issue was jurisdiction over both. The SCC held that there was no appeal from the reversal of stay by the Court of Appeal, because it will get into the merits of the case. The SCC upheld the Court of Appeal's judgment and held that there is jurisdiction because the real and substantial connection requirement was the basic requirement in a civil matter, but it does not apply here at all, since it is an enforcement action which is different. The SCC also stated that an enforcement action is different from the original action in that the only requirement is the proof that Chevron US has been served.

According to Professor Blom, the SCC could have just say substantial connection is "messier" and Chevron US could have argued foreign non-convenience or fraud. Chevron Canada could have argued that there has to be a real and substantial connection between corporate entity in Canada and the claim.

Implications of this case:

The question remains whether there is a form of necessity. For instance, can you sue here if it is not possible to sue somewhere else? Quebec has a law that allows that.

The Equustek case:

The case is about making industrial networking equipment in British Columbia. Although the Plaintiffs got an interlogatory injunction against the Defendants, the Defendants continued to vigorously market their product on the Internet. The Plaintiffs wanted an injunction against Google for beating them to index the wrongdoer's (the Defendant's) website. There has to be a real and substantial connection between the party and British Columbia. The Plaintiff is based in British Colombia, which was enough for the court to grant an injunction against Google to stop indexing the wrongdoer's (the Defendant's) website, because there is no other way to stop the wrongdoer (the Defendant) except through Google. Google's argument was that If the injunction is granted, then Google will be subjected to every court on the planet. The key take away point is that globalization changes everything about jurisdiction of state courts.

Gib van Ert:

According to Ert, many people are going into international law, but he questions whether that trend will continue. Every year, there is more to say about international law. Year after year, Canadian courts have to grapple with international law increasingly more so than the years preceding. Ert summarizes a few key cases that has significance this year.

Hupacasath First Nation v. The Minister of Foreign Affairs Canada and the Attorney General of Canada [2015] FCA 4:

The First Nations of British Colombia challenges the Canada-China Investment Agreement, and challenges Canada's decision to enter into the agreement which affects the rights of First Nations of British Columbia to British Colombia lands.

The claim lost at first instance but then went on to appeal. The most important issue on appeal was the Federal Court of Appeal (the "FCA") of its own motion decides to examine the question whether it have jurisdiction to appeal. For the Ontario Court of Appeal (the "OCA") case, the question was whether the power to review a prerogative power was inherent in the court. The SCC held that the FCA should not to be quick to find that it lacks jurisdiction, because the FCA had parallel jurisdiction to review prerogative power

as the provincial court. The FCA also examined justiciability, which was seen in the UK jurisprudence and was cited in a variety of UK decisions. However, the FAC did not cite any Canadian authorities or examined whether English law of justiciability applies here.

Saskatchewan Federation of Labour v. Saskatchewan [2015] SCC 4:

The SCC held by a majority that the right to strike is protected by s.2(d) Charter – freedom of association. It was held that it's not about legitimacy or whether we should follow international law. Where the majority agrees is the question of whether international law requires or recognizes a right to strike. The key question is what does international law require of Canada? The Charter is to be presumed to protect human rights at least to the same extent as international human rights obligations. International law does not recognize the right to strike but the Canadian Charter does.

Gitxaala Nation et al v. Her Majesty the Queen, Attorney General of Canada, Minister of Environment, Northern Gateway Pipelines Inc., Northern Gateway Pipelines Limited Partnership, and National Energy Board [2015] FCA 73:

This case is about applications to intervene. The case guides the would-be interveners about how to raise international law arguments before the Federal Court. The interveners of the case were Amnesty International and the Canadian Association of Petroleum Producers. The role of public international law in domestic adjudication is also examined. For instance, if a legislative provision is clear and unambiguous, then international law cannot be used to change its meaning. However, even if legislative is not ambiguous, if it grants the court discretion, the court may look at international law to clarify (it's consistent with the *Baker* decision). In February, the SCC heard some important appeals in Refugee cases – such as *Jesus Rodriguez Hernandez v. Minister of Public Safety and Emergency Preparedness*, where the meaning of human trafficking prohibitions in the Canadian *Immigration and Refugee Act* was examined.

Charles-Emmanuel Cote:

Over 3,000 treaties worldwide were on international economic law and Canada is one of the most sued countries in the world. The focus of the digest is on cases that relate to Canada, such as cases initiated by Canadian investors to foreign investors.

(in French)

Elise Hansbury: (in French)

Bernard Duhaime: (in French)