

BC CBA International Law Section – Report to National Section meeting

May 29, 2015

Meetings: September 2014 – June 2015

Introduction to the BC section

Our meetings normally centre on guest speakers, with questions and discussion following the speaker's presentation. We try to balance presentations on private and public international law.

The meetings are held in either Victoria or Vancouver, depending on where the guest speaker is located. We always use the CBA webinar hosting facility in order to allow members in both cities (and in other parts of the Province) to attend, no matter where the meeting is held.

In spite of its size as compared to Vancouver, Victoria is home to quite a large number of retired diplomats and as well as other persons who currently work, or have worked, internationally. It also has a military (navy) Base where the military lawyers of the Office of Judge Advocate, Pacific Region are located. And, as the capital of BC, it is home to most main government offices. Victoria's size is actually advantageous in that it is feasible for a speaker to travel to downtown Victoria (meetings are held in a Boardroom at the Ministry of Justice) for a lunch time meeting.

In Victoria, we generally hold meetings at noon since this seems to be the time when people are most available. The Vancouver meetings are sometimes held at 5 pm due to the fact that it would be too time-consuming for people to travel to downtown and back for a lunchtime meeting.

For Victoria meetings, I use the boardrooms and technical equipment of Legal Services Branch in the Ministry of Justice, with the tacit approval of our Assistant Deputy Attorney General. Our Branch is quietly but consistently supportive of CBA education activities. In Vancouver, my co-Chair, Jeff Horswill at DLA Piper (Canada) LLP (formerly Davis LLP), uses his law firm's boardrooms facilities.

2014-2015 Meetings

October 3, 2014: Speaker – Dr. Ronald Crelinsten, Associate Fellow, Centre for Global Studies, University of Victoria

Dr. Ronald Crelinsten is Associate Fellow at the Centre for Global Studies at University of Victoria and Adjunct Professor in the Doctor of Social Sciences Program at Royal Roads University. His research deals with the issues of terrorism and radicalization and how to counter them effectively without endangering democratic principles; global security; gross human rights violations; the role of old and new media in terrorism and political violence; and challenges of democratization and global governance. He has written extensively on the subject of terrorism.

Topic: The Islamic State group: Where does it come from and where is it going?

Dr. Crelinsten gave a comprehensive and very up-to-date presentation on the Islamic State group (also known as ISIS or ISIL). He explained how and why the group came into existence and what advances into territory in Syria and Iraq it has been made. He commented on the types of developments that might be expected in the future. He also spoke about foreign fighters.

December 3, 2014: Speaker – Mark Underhill

Mark Underhill practised with Arvay Finlay, a leading public law litigation boutique, for ten years before establishing Underhill Boies Parker in 2005. His areas of interest focus on aboriginal, administrative, environmental, and constitutional law, and he maintains a broad general civil litigation practice.

He was First Nations counsel for the case under discussion: *Hupacasath v. Canada*

Topic: Canada-China Free Trade Agreement

- Question of First Nations role in international investment treaties.
- Mark's client brought claim in 2013 that they should have been consulted prior to the signing of FIPA (2012).

- CC-FIPA was first bilateral trade agreement [“BIT”] for Canada where investment in Canada substantially outweighed the reverse – China seeking to secure their investments here in Canada (as opposed to the ‘traditional’ use of BITs by developed countries to secure investments in developing countries).
- Core aspects of BITs:
 - Minimum standard of treatment
 - Indirect expropriation (w/o compensation)/ “right to regulate”
 - Most favoured nation clause
- Claims under these BITs are adjudicated by independent international arbitration tribunals.
- Crown obligated to consult when contemplating actions that may impact Aboriginal rights. This case sought to target FIPA as a high level decision that triggered the duty to consult.
- Trigger for duty to consult is low, but the scope and nature of that consultation will be case-specific.
- Arguments:
 - All these First Nations will ultimately be required under their own treaties with the Government to conform with Canada’s international legal obligations..... ergo the duty to consult. Given the low bar for the duty to consult, shouldn’t there at least be an exploration of whether CC-FIPA affects them?
 - Canada signing up for compliance with these standards (for 30 year period) under CC-FIPA. What happens when Canada takes steps and First Nations require accommodation due to a related claim, and China challenges it as indirect expropriation? How do you balance potentially conflicting rights?
 - Whilst there exists a carve out for First Nations rights from giving rise to claims, doesn’t apply to minimum standard of treatment or indirect expropriation.
- Law of Aboriginal rights is evolving and locking Canada in to abide by international standards for 30 years is dangerous given the likely evolution of self-governance over that period.

January 26, 2015: Speaker – Professor Jennifer Koshan, University of Calgary, Faculty of Law

Professor Koshan was an active participant in this litigation on behalf of the group of Kenyan girls.

This presentation was done jointly with the Alberta International Law Section.

Topic: 160 Girls Litigation Successful in Kenya; Decision of the High Court of Kenya - *C.K. et al v The Commissioner of Police et al*, Petition No. 8 of 2012, High Court of Kenya (May 27, 2013)

Working with local organizations, the NGO, Equality Effect, brought a constitutional claim against the government of Kenya for failing to protect girls from sexual abuse, and to properly investigate / prosecute their claims. The claim was brought under the Kenyan constitution, a document that directly incorporates international law. The group was successful in winning a judgment against the Kenyan government in May 2013 based in part on the Universal Declaration of Human Rights, The Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the African Charter on Human and Peoples Rights.

February 20, 2015: **Speaker – Carolyn McCool**

Carolyn McCool was in Kosovo from 1999 – 2002 as first Director of the Mitrovica Region, and later the Director of Democratization, for the OSCE Mission. She subsequently served as Head of UNIFEM in Afghanistan.

Topic: The Role of Law in Peace Building: When International Law is Domestic Law

Violent conflict can lead to the collapse of a state and its institutions, including those of law and justice, leaving only a vacuum. How does re-building from nothing take place? Peace building is much more than the end of hostility.

What happens in a post-conflict society where institutions have collapsed? In these societies, the Rule of Law has eroded without supports, so questions arise as to the origins of law. These include traditional bodies of law, pre-conflict law, UN entities and international law.

- What is the Rule of Law in these societies? It is not only the set of laws that over the land, but also the higher vision / meta-principles. The goals of a Rule of Law missions is to try to reconcile these two to return a functioning legal system on both levels.
- Emphasis on the 3 core guiding principles:
 - Do no harm
 - Local ownership
 - Leading from Behind
- It has proven difficult to retain these core principles at the center of Rule of Law Missions in both Kosovo and Afghanistan.

- Complexity also arises from inherent conflicts between Rule of Law missions and Peace building missions.
- UNSC Resolutions 1244 (Kosovo) and 1383 (Afghanistan). Interesting, important differences in approach with UN becoming the government in Kosovo and the international community providing support to Afghan institution building processes.
- Discussion of the challenges of the role of politics in law in the context of post-conflict societies; ameliorating traditional or religious legal frameworks with secular international approaches, etc.
- Brief discussion of the role of criminal tribunals and the interaction between international and domestic prosecutorial machinery.

May 25, 2015: Speakers – Anne Wittman of the Shareholder Association for Research & Education and Wendy King, VP Legal, Governance and Risk, Capstone Mining

Anne leads SHARE's law reform and advocacy programs. Her responsibilities include shareholder engagement and proxy voting services.

Wendy is responsible for managing the legal function at Capstone, in addition to leading matters relating to corporate governance and overseeing the enterprise-wide risk management strategy.

Topic: Why Human Rights are part of a Corporate Counsel's Job

Anne Wittman of SHARE provided a primer for corporate counsel on human rights . Her focus is on emerging human rights norms for corporate behavior, in particular the UN Guiding Principles on Business and Human Rights, and what they mean for Canadian businesses, governments and civil society.

Wendy King provided some practical advice regarding recent developments in human rights cases which have a business context.

