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Yet Another Trojan Horse? The Alberta Court of Appeal's Opinion in Reference re *Impact Assessment Act* and the Future of Canadian Environmental Federalism

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> The *IAA* raises an issue of fundamental fairness. Through this legislative scheme, Parliament has taken a *wrecking ball* to the constitutional right of the citizens of Alberta and Saskatchewan and other provinces to have their 92A natural resources developed for their benefit. *And in doing so, it has also taken a wrecking ball to something else – and that is the likelihood of capital investment in projects vital to the economy of individual provinces.* Capital investment does not just happen, especially where the capital investment is measured in the billions, not millions of dollars. And it particularly does not happen where, as under this legislative scheme, the investing rules are uncertain, unpredictable, unquantifiable and unreliable.[1]

In Reference re *Impact Assessment Act*, a majority of the Alberta Court of Appeal opined that the *Impact Assessment Act* and its *Physical Activities Regulations* (the Act's designated projects list) is *ultra vires* Parliament's legislative authority under section 91 of the *Constitution Act, 1867*. The Court's nonbinding advisory opinion is the latest salvo in an ongoing public policy battle over how to respond – if at all – to climate change and achieve sustainability that is being waged in the courts, following Alberta's, Ontario's, and Saskatchewan's proxy challenges to the constitutional validity of the *Greenhouse Gas Pollution Pricing Act*. The Alberta Court of Appeal's opinion seeks to put its thumb on the scale of this public policy battle in favour of Alberta and its fossil-fuels extraction and export industries, but its legal reasoning is untenable. When the Supreme Court of Canada reviews the opinion during the upcoming 2022-2023 term, it will almost assuredly overturn it based on settled constitutional law doctrine. What is most significant – and concerning – about the Court of Appeal's reasoning is its transparently politicized nature, which calls into question its independence and integrity.

Background

The *Impact Assessment Act* was enacted in 2019.[2] The Lieutenant Governor in Council asked for the Court of Appeal's advisory opinion on two questions:

1. Is Part 1 of An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, S.C. 2019, c. 28 unconstitutional, in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada?

[1] Reference re *Impact Assessment Act*, 2022 ABCA 165 (CanLII) at para 28 [emphasis added].
[2] *Impact Assessment Act*, SC 2019, c 28, s 1.

2. Is the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part by virtue of purporting to apply to certain activities listed in Schedule 2 thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada?[3]

The *Impact Assessment Act* replaces the *Canadian Environmental Assessment Act, 2012*, which replaced the *Canadian Environmental Assessment Act* of 1992.[4] Like the 2012 Act, which effectively gutted the federal environmental assessment regime, the *Impact Assessment Act* only applies to Canada's largest natural resources and infrastructure projects.[5] The assessment process under the *Impact Assessment Act* begins with the *Physical Activities Regulations*, or the designated project list. The project list includes over 60 types of projects that, based on their type and size (*e.g.*, certain kinds of mining, dams, highways, *etc.*), have the potential to affect areas of federal jurisdiction.[6] When projects are proposed that fall under the types included in the project list, they are screened by the federal Impact Assessment Agency to determine whether they are to be assessed. Where projects are designated for assessment under the *Impact Assessment Act*, either the Minister of the Environment and Climate Change or the Governor in Council (Cabinet) ultimately decides whether a project's impacts on areas of federal jurisdiction are in the public interest based on a series of factors set out in the Act, including:

- the extent to which the designated project contributes to sustainability;

- the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;

- the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;

- the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and

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[3] These questions were posed by way of an Order in Council issued under section 26 of the *Judicature Act*, RSA 2000, c J-2.

[4] *Canadian Environmental Assessment Act*, SC 1992, c 37.

[5] My environmental law colleague Martin Olszynski aptly characterizes the *Impact Assessment Act* as a "major project" regime, the starting point for which is the list of designated projects. See Martin Olszynski, "Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the *Impact Assessment Act* is Unconstitutional" (24 May 2022), *ABlawg.ca* (blog), online: https://ablawg.ca/2022/05/24/carbon-tax-redux-a-majority-of-the-alberta-court-of-appeal-opines-that-the-impact-assessment-act-is-unconstitutional/.

[6] *Ibid.*

- the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.[7]

Characterization and Classification of the *Impact Assessment Act*

Majority opinion

It is well established that the division-of-powers analysis has two steps: (1) characterizing the purpose – the pith and substance – of the legislation, and (2) classifying the legislation's purpose by reference to federal and provincial heads of power.

The Alberta Court of Appeal's majority opinion characterizes the *Impact Assessment Act* as "a classic example of legislative creep."[8] According to the majority, "[w]ere the courts to uphold the validity of the *IAA,* all provincial industries, almost every aspect of a province's economy that the federal government chooses to sweep within the *IAA*, along with a province's development of its natural resources, would be subject to federal regulation, including an effective federal veto."[9] This, the majority continues, "would undermine the division of powers," and "it would effectively write s 109 and 92A(1) out of the Constitution, *thereby ending the provinces' constitutional rights to ownership and development of their natural resources*."[10]

"If upheld," the majority continues, straying further away from constitutional law analysis, "the *IAA* would permanently alter the division of powers and forever place provincial governments in *an economic chokehold* controlled by the federal government."[11] Here the majority's concern comes into clear relief:

> The *IAA* also brings to the fore legitimate concerns about stranding oil and gas resources in this country as the world transitions away from fossil fuels to a greener economy. This transition will take time. That is why it is called a transition. That time may be measured in double digits, *if not three or possibly four decades*, particularly if carbon capture, utilization and storage, the use of hydrogen and small modular nuclear reactors allow those resources to be developed in, or near, a net-zero manner. *While many may be delighted by the prospect of stranding these resources,* including Canada's oil and gas competitors who would thereby enhance their own position for markets outside Canada and potentially within Canada too, that enthusiasm may not be shared

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[7] *Impact Assessment Act, supra* note 2 at section 63. For a comprehensive overview of the Act, see Meinhard Doelle & A John Sinclair, eds, *The Next Generation of Impact Assessment:* A Critical Review of the *Canadian Impact Assessment Act* (Toronto: Irwin Law, 2021).
[8] Reference re *Impact Assessment Act, supra* note 1 at para 10.
[9] *Ibid* at para 24.
[10] *Ibid* at paras 24-25 [emphasis added].
[11] *Ibid* at para 25 [emphasis added].

> by the provinces that own these resources not by the citizens of those provinces.[12]

The majority concludes that the *Impact Assessment Act* is properly characterized as "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval."[13] According to the majority, when the Act is applied to "intra-provincial designated projects," the Act's "subject matter does not fall under any heads of power assigned to Parliament but rather intrudes impermissibly into heads of power assigned to provincial Legislatures by the *Constitution Act, 1867*."[14]

The majority's characterization of the *Impact Assessment Act* is strikingly reminiscent of the Court's earlier characterization of the federal *Greenhouse Gas Pollution Pricing Act*. Also writing for the majority in that reference case, Chief Justice Fraser opined that

> ***The Act is a constitutional Trojan Horse***. Buried within it are wide ranging discretionary powers the federal government has reserved unto itself. Their final shape, substance and outer limits have not yet been revealed. But that in no way diminishes the true substance of what this Act would effectively accomplish were its validity upheld. Almost every aspect of the provinces' development and management of their natural resources, all provincial industries and every action of citizens in a province would be subject to federal regulation to reduce GHG emissions. It would substantially override ss 92A, 92(13) and 109 of the Constitution.[15]

Dissenting opinion

By contrast, the dissenting opinion of Greckol J.A. characterized the *Impact Assessment Act* as establishing "a federal environmental assessment regime that facilitates planning and information-gathering mostly in relation to 'designated projects'".[16] According to Greckol J.A.,

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[12] *Ibid* at para 30 [emphasis added]. Note that there is no evidence to support the majority's speculation about the transition to decarbonization. Indeed, the majority's speculation runs completely counter to the best available climate change science and policy research. See e.g. Jason MacLean, "Canada's latest climate plan is reckless, but a better way forward is still possible," *The Conversation* (14 April 2022), online: https://theconversation.com/canadas-new-climate-plan-is-reckless-but-a-better-way-forward-is-still-possible-180846.

[13] *Ibid* at para 31.

[14] *Ibid* at para 31.

[15] *Reference re Greenhouse Gas Emissions*, 2020 ABCA 74 at para 22 [emphasis added]. For an analysis in these pages of this decision along with the Saskatchewan and Ontario advisory opinions, and the Supreme Court of Canada's ultimate decision finding that the *Greenhouse Gas Pollution Pricing Act* is a valid exercise of the federal government's national concern jurisdiction under the Peace, Order and Good Governance (POGG) clause of section 91 of the *Constitution Act, 1867*, see Jason MacLean, "A Narrow and Myopic National Concern: Climate Change Law and Policy After the SCC's *References re Greenhouse Gas Pollution Pricing Act* Decision," *Toronto Law Journal* (April 2021), online: https://tlaonline.ca/uploaded/web/TLA%20Journal/2021/Case%20Comment%20re%20GGPPA%20References.pdf.

[16] Reference re *Impact Assessment Act, supra* note 1 at para 437.

"[t]he legislative scheme is ultimately concerned with whether such projects may cause 'adverse effects' said to be within the legislative authority of Parliament, and if so, whether those effects are in in 'the public interest."[17]

Greckol J.A. classified the *Impact Assessment Act's* – and its project list's – purpose as falling under "Parliament's authority to legislate on the matter of the environment."[18] Moreover, she explained that "[m]ost of the designated projects involve activities within areas of federal jurisdiction and *prima facie* within s 91 of the *Constitution Act, 1867* – such as national parks, interprovincial railways, and offshore oil and gas facilities – that may have *effects* upon areas *also* within federal jurisdiction, such as fish habitat, federal lands, or Indigenous peoples."[19] The remainder of the designated project types are "intra-provincial and *prima facie* within s 92 of the *Constitution Act, 1867* – such as mines and metals, and oil and gas facilities – that may have *effects* upon areas of federal jurisdiction, such as fish habitat, federal lands, or Indigenous peoples."[20]

"In either case," Greckol J.A. helpfully clarifies, "the project-based federal environmental assessment regime in the *IAA* and *Regulations* target *effects in federal jurisdiction*."[21] Greckol J.A. concludes that the "*IAA* confines its reach to protection of the environment and the health, social and economic effects of select activities that in its view, have the greatest potential for adverse effects on areas of federal jurisdiction."[22]

Conclusion: The Future of Environmental Federalism in Canada

The foundation of the majority's opinion is a fundamental mischaracterization of jurisdiction over matters of environmental protection in Canada. As Olszynski rightly observes, the majority's opinion is premised on an understanding of environmental jurisdiction "that has no direct precedent in Canadian constitutional or environmental law jurisprudence."[23] Here is the majority's unprecedented view of jurisdiction over the environment:

> Under the Constitution, the "environment" is not a head of power assigned to either Parliament or provincial Legislatures: *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at 63 [*Oldman River*]. That being so, when either government level legislates for purposes relating to the environment, that legislation *must* be linked to a specific head of power within its jurisdiction. A meritorious motive – protection of the environment – does not by itself found constitutional jurisdiction for either level of government. *Accordingly, Parliament is not entitled, on the basis that Canadians nationally share legitimate concerns about the environment and*

[17] *Ibid* at para 437.
[18] *Ibid* at para 443.
[19] *Ibid* at para 443 [emphasis in original].
[20] *Ibid* at para 443 [emphasis in original].
[21] *Ibid* at para 443 [emphasis in original].
[22] *Ibid* at para 765.
[23] Olszynski, *supra* note 5.

> *climate change, to legislate and regulate on the environment generally. Nor is Parliament entitled to require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction on the basis of the environmental effects of those projects, and factors, not linked, or not sufficiently linked, to a federal head of power. And yet this legislative scheme authorizes just that.*[24]

Greckol J.A. responds to this misstatement by setting out "at least five important legal points already established by the Supreme Court of Canada"[25] to provide a useful backdrop to the reference. Those points include:

(1) **The environment "is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial"**: *R v Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 SCR 213 at para 112, 151 DLR (4th) 32 [*Hydro-Québec*]; see also *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at 63-64, 88 DLR (4th) 1 [*Oldman River* cited to SCR];

(2) **Some local projects will have both a provincial aspect and a federal aspect:** *Oldman River* at 69; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 36, [2010] 1 SCR 557 [*Moses*]. As noted by La Forest J in *Oldman River* at 69, "[a]lthough local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction". Accordingly, "[t]he effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental assessment of *any project* that has *any effect* on *any matter within federal jurisdiction*": Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed supplemented (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021) at § 30.32 [Hogg] [emphasis added];

(3) **Due to this overlap, both federal and provincial environmental assessment regimes can apply to a given project, which has been held to be "neither unusual nor unworkable"**: *Quebec (Attorney General) v Canada (National Energy Board)*, 1994 CanLII 113 (SCC), [1994] 1 SCR 159 at 193, 112 DLR (4th) 129 [*National Energy Board* cited to SCR]. Environmental assessments have accordingly come to contemplate a cooperative approach to protecting the environment through shared impact assessment responsibilities between jurisdictions, including by means of bilateral agreements between individual provinces and the federal government;

(4) **A federal environmental assessment regime applicable to local projects is permitted to review and assess the *entire project* as proposed by a proponent rather than simply the scope of the project thought to fall within federal jurisdiction:** *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 [*MiningWatch*]; and

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[24] Reference re *Impact Assessment Act*, *supra* note 1 at para 9 [initial emphasis in original, latter emphasis added].
[25] *Ibid* at para 444.

(5) **There is no constitutional imperative that environmental assessment legislation use a particular trigger to initiate a federal assessment**, such as the "affirmative regulatory duty" described in *Oldman River*: *Moses* at para 13, aff'g 2008 QCCA 741 at paras 93-115.[26]

In accord with the Supreme Court of Canada's repeated commitment to cooperative federalism, environmental law and protection in Canada is, at its best, a joint federal-provincial effort. In respect of provincial challenges to the constitutional validity of the *Greenhouse Gas Pollution Pricing Act*, my colleague Nathalie Chalifour and I explained that since the Supreme Court of Canada's decision in *Crown Zellerbach*,[27] the Supreme Court of Canada has further clarified that where both provincial and federal laws apply to a regulatory problem, those laws may operate alongside one another. This overlap helps protect against the creation of legal vacuums where neither level of government acts, which would defeat the very purpose of a federal-provincial division of powers; it also recognizes the increasing complexity of Canadian society.[28]

In fact, only in cases where federal and provincial laws genuinely conflict — where it is impossible to follow both laws or where a provincial law frustrates the purpose of a federal law — is federal law paramount. And courts will construe such potential conflicts narrowly to safeguard provincial jurisdiction and facilitate federal-provincial cooperation.[29] This hardly amounts to the end of federalism, as the majority of the Court of Appeal prophesies.

Rather, this is how effective environmental regulation works in Canada. The City of Victoria, for instance, regulates sewage discharge into the ocean alongside federal law. Ottawa regulates toxic pollution federally under the *Canadian Environmental Protection Act* in conjunction with the provinces' environmental pollution laws. Species at risk are protected in the same way: the federal *Species at Risk Act* functions as a kind of federal safety net to backstop provincial endangered species laws.[30]

But perhaps the key difference underlying the majority's unprecedented constitutional interpretation and the dissent's adherence to settled principles comes down to how the majority and the dissent frame – and prioritize – the challenge of climate change.

To the majority, climate change "constitutes an existential threat to Canada. But climate change is not the only existential threat facing this country. The *IAA* involves another existential threat – one also pressing and consequential – and that is the *clear and present danger this*

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[26] *Ibid* at para 444 [emphasis added].
[27] *R v Crown Zellerbach Inc.*, [1988] 1 SCR 401.
[28] Jason MacLean & Nathalie Chalifour, "Supreme Court case on carbon price about climate change, not the Constitution," *The Conversation* (22 September 2020), online: https://theconversation.com/supreme-court-case-on-carbon-price-is-about-climate-change-not-the-constitution-146471.
[29] *Ibid*.
[30] *Ibid*.

legislative scheme presents to the division of powers guaranteed by our Constitution and thus, to Canada itself."[31]

The dissenting judge, however, understands that federalism is flexible, not cast in stone nor fixed in time, and its purpose is to help us solve our most pressing problems: "All this to say, the complexities and urgency of the climate crisis call for co-operative, interlocking environmental protection regimes among multiple jurisdictions, each functioning at its highest and best within their constitutional jurisdiction."[32]

It is now up to the Supreme Court of Canada to reaffirm this settled and entirely sensible approach to Canadian environmental federalism.

[31] Reference re *Impact Assessment Act*, *supra* note 1 at para 6 [emphasis added].
[32] *Ibid* at para 764.

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SNC-Lavalin 2.0: Canada's first official Remediation Agreement

Kenneth Jull, Gardiner Roberts LLP

In the May 2020 edition of this Journal I wrote about "SNC-Lavalin: The Final Chapter". As it turns out, this was not the final chapter after all.

The second chapter of the SNC Lavalin affair was written in 2022 when SNC-Lavalin Group Inc. negotiated the first remediation agreement in Canadian history to settle criminal charges related to a bridge contract in Montreal two decades ago. The remediation agreement was negotiated with Quebec's office of criminal prosecutions, known as the Directeur des poursuites criminelles et pénales (DPCP).[1] As part of a three-year agreement, SNC will pay an aggregate amount of $29.6 million which is a combination of fine, confiscation, compensation and surcharge.[2]

This first remediation agreement is a green light that signals that the remediation programme in Canada is inviting organizations to come in from the cold.

(i) The First Chapter

The prior experience with SNC-Lavalin put a chill in the air, given that they were denied a remediation agreement. In an exclusive interview with *The Globe and Mail*, Kathleen Roussel, the director of the Public Prosecution Service of Canada, laid out—for the first time—her reasons for rejecting SNC's request for a deferred prosecution agreement ("DPA"), also known as a remediation agreement. In the interview, Ms. Roussel said it was inappropriate to grant a DPA to the Montreal-based engineering and construction giant because the offences were so serious. They centred on allegations that the company paid $48 million to influence the awarding of government contracts under Moammar Gadhafi's regime and allegedly defrauded various Libyan organizations of roughly $130 million.

"The factor that really weighed against a remediation agreement was really the severity and breadth of the offence", said Ms. Roussel. "It was long in time—if you look at the hierarchy of the company, how high the scheme went in the hierarchy of the company. I think it is a pretty unprecedented offence in Canada and as a result of that, I didn't feel it was in the public interest."[3]

The SNC-Lavalin case was resolved in late 2019 when the company entered a guilty plea to a count of fraud committed against various Libyan authorities. The charges under the *Corruption of Foreign Public Officials Act (CFPOA)* were withdrawn. SNC-Lavalin paid $280 million as a

[1] https://www.theglobeandmail.com/business/article-snc-lavalin-strikes-deal-with-prosecutors-to-settle-bribery-charges/

[2] The aggregate amount includes a fine of 18M and to that amount was added a confiscation (around 3M), a compensation to the victim (around 4M) and the surcharge of 30% of the fine (5.5M).

[3] https://www.theglobeandmail.com/politics/article-top-federal-prosecutor-says-she-felt-no-political-pressure-on-snc/

fine, which is one of the largest fines assessed against a corporation in Canada. Although the plea relates to fraud, the court recognized the elements of corruption that were involved. Justice LeBlond, the sentencing judge, cited the prosecution's submission that determining "the appropriate fine level for organizations is not achieved through a purely arithmetical process under Canadian law, especially in relation to offences such as fraud and corruption where there is limited precedent".[4]

The plea to fraud against Libyan authorities avoided the collateral damage of debarment that would have accompanied a plea or finding of guilt under the *CFPOA*. While fraud committed against the Canadian government is covered under the Public Works Department's integrity regime—and could thus trigger a ban—a fraud offence connected to a foreign government is not. I am on record as having described this deal as a deferred prosecution agreement "through the back door."[5]

As stated in my earlier article in this Journal, this plea resolution can be perceived as a just result that reflected significant risk on both sides. From the defence perspective, a conviction would have brought certain debarment. The resolution allows SNC-Lavalin to continue to bid on federal contracts. This will have positive impacts on those innocent employees who were not complicit in the bribery as well as other innocent stakeholders such as pension funds who hold shares in the company. The court recognized this factor in the sentencing judgment:

> This mitigating factor considers the impact that a fine may have on individuals who are dependent on the corporation and who are not at fault. Such individuals include employees, as well as shareholders and other stakeholders such as pensioners, suppliers and clients.[6]

The prosecution also faced significant risks. Had the case of *SNC-Lavalin* gone to trial with respect to allegations of breaching the *CFPOA*, the issue of scope of authority of senior officers who paid or authorized bribes would have been likely litigated. Under s. 22.2 of the *Criminal Code* this was a hurdle that the prosecution would have had to clear on the standard of proof of beyond a reasonable doubt.

(ii) SNC-Lavalin 2.0: The second chapter involving the Jacques Cartier Bridge

Quebec prosecutors had charged two of the company's business entities – SNC-Lavalin Inc. and SNC-Lavalin International Inc. – and former SNC vice-presidents Normand Morin and Kamal Francis in connection with a long-standing RCMP investigation into bribes paid on a $128-million contract to refurbish Montreal's Jacques Cartier bridge in 2002. Michel Fournier, the former head of the Federal Bridge Corp., pleaded guilty in 2017 to fraud-related charges for accepting more than $2.3 million in kickbacks from SNC in the Jacques Cartier bridge case and laundering

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[4] *The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodec Inc.)* Court of Quebec (Criminal and Penal Division), N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond, para 9.6

[5] Legal observers noted the settlement's effect is likely similar to what a DPA would have achieved: A hefty fine, a statement of guilt and monitoring of the company for a prescribed period. "One could say it's a DPA through the back door", said Kenneth Jull: https://www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption.

[6] *The Queen v. SNC-Lavalin Construction Inc. (Formerly Socodec Inc.)* Court of Quebec (Criminal and Penal Division), N° : 500-73-004261-158 (December 18, 2019) Sentencing Judgment of Justice LeBlond, para. 10.36, citing T. Archibald, K. Jull and K. Roach, "The Changed Face of Corporate Criminal Liability" (2004), 48 Crim. L.Q. 367, at 390.

the funds. He was sentenced to 5½ years, and has since received full parole. The police probe then focused on who arranged the bribes.

The prosecutors said that offering SNC-Lavalin the chance to negotiate a remediation deal is the appropriate path to prevent collateral damage to the company's stakeholders. "I think it fits" as a solution in this case, said Crown prosecutor Patrice Peltier-Rivest of the DPCP. "This is an alternative to a more classic sentence – an alternative that allows for a lessening of the effects on employees, on retirees, on shareholders, on the clientele of SNC-Lavalin."[7] Mr. Peltier-Rivest has said SNC co-operated with authorities during police searches and voluntarily provided relevant information afterward, which contributed to the decision to extend an offer to negotiate a deal.

This agreement is in the public interest," said François Fontaine, a lawyer with Norton Rose representing SNC-Lavalin. "SNC is getting a deal here because it is an important company and there is no reason to punish all of its stakeholders for the actions of a few individuals."[8]

On a pure numbers basis, it would have been inconsistent to debar SNC-Lavalin in relation to the less serious case involving the Jacques Cartier bridge but to spare them from debarment in the more serious Libyan case.

(iii) The Remediation Agreement avoids potential debarment

With respect to the debarment regime, an interesting point is that the decision by a ***provincial*** prosecutor to offer a deferred prosecution agreement has implications for the ***federal*** debarment regime. Given that the effect of the Remediation Agreement is only to "suspend" the charges laid against the organizations, SNC was invited by Public Services and Procurement Canada (PSPC) to negotiate an Administrative agreement in relation to the federal Integrity regime.[9] This agreement allows the Company to continue to do business with the Government of Canada in accordance with its Integrity Regime originally adopted on July 3, 2015.

(iv) The historical and comparative context of the remediation legislation

At the end of May 2022 Justice Downs released extensive reasons for approving the remediation agreement under the legislative framework.[10] The reasons of Justice Downs are the first reasons provided by a Court in Canada in relation to the new remediation agreement scheme, which requires judicial approval.

Justice Downs noted that the legislation to create the remediation regime was introduced in 2018, and this was the first case where a Court ruled under the legislation. The Court referenced section 715.34 of the *Criminal Code* which set out the mandatory contents of any remediation agreement

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[7] https://www.theglobeandmail.com/business/article-snc-lavalin-strikes-deal-with-prosecutors-to-settle-bribery-charges

[8] https://www.theglobeandmail.com/business/article-snc-lavalin-has-won-a-deferred-prosecution-agreement-a-first-in-canada/

[9] https://www.newswire.ca/news-releases/snc-lavalin-announces-the-signing-of-an-administrative-agreement-with-public-services-and-procurement-canada-with-regards-to-events-concerning-the-jacques-cartier-bridge-that-occurred-between-1997-and-2004-850375618.html

[10] *R. c. SNC-Lavalin inc.* [2022] J.Q. no 4581 | 2022 QCCS 1967.

and reviewed the relationship of this legislation to the corporate sentencing provisions in section 718.

Justice Downs traces the history of the invitation to enter into negotiations under section 715.32. Pursuant to section 715.37 (1), when the prosecutor and the organization have agreed to the terms of a remediation agreement, the prosecutor must apply to the court in writing for an order approving the agreement. The Court referred to the U.K. parallel legislation, *Crime and Courts Act 2013* (R-U), 2013, c. 22, Schedule 17, art. 7 et 8, with respect to guidance for the application of the stages of approval. Schedule 17 sets out the detailed provisions for "Deferred Prosecution Agreements". The UK legislation differs from the Canadian legislation in a number of respects. For example, the UK legislation requires Court approval at a preliminary stage, before the terms of the DPA are agreed, and then requires a second approval at a final hearing.

Justice Downs describes the Canadian legislation as combining the best of both the American deferred prosecution system with the transparency of the U.K. regime, while at the same time recognizing the interests of victims:

> Dans l'élaboration de la partie XXII.1 C.cr., le législateur s'est rapproché davantage des fondements du régime britannique que du régime américain, en ce qu'il a fait le choix d'un contrôle judiciaire et d'une volonté de transparence. Il accorde également une place à la victime.[11]

Justice Downs cites the UK comparative experience with respect to the Canadian adoption of a judicial review model of deferred prosecution agreements. Specifically the Court cites the following passage from Polly Sprenger's *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties*:[12]

> The primary difference envisaged by the UK government, and later enacted by the Crime and Courts Act 2013, was that UK DPAs, unlike their American predecessors, would be overseen, endorsed and enforced by the courts, rather than the prosecutor or regulator: "Under our plans, the judiciary will play a vital independent role in this process to ensure that DPAs are properly scrutinised, transparent and in the interests of justice. They will be empowered to block them if they do not agree that they are an appropriate response to the organisation's wrongdoing". The oversight by the court, would ensure "public scrutiny of the process – the public will know what wrongdoing has taken place and the sanctions for it, including any penalty that has been paid. The final hearing will be held in open court and the final agreement will be published by the prosecutor."[13]

(v) Judicial Approval

Justice Downs reviews the intention of the remediation scheme to reduce the impact of convictions on innocent stakeholders, such as employees who were not involved in the crimes in issue. Justice Downs specifically enumerates the ways in which SNC Lavalin cooperated with

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[11] *R. c. SNC-Lavalin inc*. 2022 QCCS 1967 at paragraph 104.
[12] Polly SPRENGER, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (London: Thomson Reuters, 2015) at p. 24.
[13] *R. c. SNC-Lavalin inc*. 2022 QCCS 1967 at paragraph 109.

the authorities and fundamentally transformed its leadership since 2012. Specifically, Justice Downs cites the first report of the monitor appointed by Justice Lebond in the SNC-Lavalin decision relating to fraud on the Libyan government as follows:

> SNC-Lavalin has expended considerable effort on the remediation of its anti-corruption compliance program and has transformed its culture of ethics and compliance. As further described below, our independent assessment is that these remediation efforts have culminated in the development of one of Canada's leading anti-corruption compliance programs.[14]

Justice Downs concludes that the remediation agreement in the Jacques Cartier case is in the public interest, in denouncing the behavior of those responsible, but also recognizing that those responsible have left SNC and the corporation has made significant steps to enhance compliance measures:

> Toutefois, au regard de l'ensemble des circonstances, le Tribunal estime que l'Accord est dans l'intérêt public. L'Accord permet de dénoncer les actes répréhensibles des Organisations, tout en réduisant les torts qu'entraineraient des condamnations pénales pour des tiers qui ne se sont pas livrés à des actes répréhensibles. Les Organisations ont fait preuve d'une forte coopération, permettant ainsi que les individus responsables soient soumis au système de justice. Il y a eu également des changements importants dans les Organisations : les personnes responsables ne font plus partie de la direction des Organisations et des efforts considérables ont été mis dans l'élaboration de mesures pour éviter que des événements similaires ne se reproduisent. Les individus responsables sont identifiés et ont fait ou feront face à la justice.[15]

A unique aspect of the case is a table reproduced in the judgment that compares the profit from the Jacques Cartier bridge project with the remedial measures to compensate the victims. The Court cited the dicta in the *McNamara* case that *the fact that the contract did not work out as well as the conspirators expected is, in our judgment, of little consequence".*[16]

Justice Downs refers to the well known concept in corporate sentencing that a fine should be more than a licence fee for illegal activity, but less than a fatal blow.[17] Although the SNC-Lavalin Jacques Cartier case is the first remediation agreement to be approved by a Court, Justice Downs did make reference to the precedents for fines paid in relation to corruption in cases such as *R.* v. *Griffiths Energy International*, *Niko Resources Ltd*, and of course the first SNC-Lavalin case where the fine was $280 million.[18]

In conclusion, Justice Downs concludes that in light of the methods implemented to enhance compliance, the remediation agreement was equitable, reasonable and proportionate to the gravity of the offence:

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[14] *R. c. SNC-Lavalin inc.* 2022 QCCS 1967 at paragraph 178.
[15] *R. c. SNC-Lavalin inc.* 2022 QCCS 1967 at paragraph 186.
[16] *R. c. SNC-Lavalin inc.* *2022 QCCS 1967 at paragraph 193 citing R.* v. *McNamara*, (1981) 56 C.C.C. (2d) 516 (Ont. C.A.), p. 523.
[17] *R. c. SNC-Lavalin inc.* *2022 QCCS 1967 at paragraph* 199 citing *R.* v. *Terroco Industries Limited*, 2005 ABCA 141, paragr. 60.
[18] *R. c. SNC-Lavalin inc.* *2022 QCCS 1967 at paragraph* 201. These cases are reviewed in Chapter 15.

> Outre les conditions financières analysées ci-dessus, il faut ajouter au cadre de l'Accord les mesures de maintien et d'amélioration des mesures de conformité, ainsi que la nomination d'un surveillant indépendant alors même que les Organisations font l'objet d'une surveillance depuis déjà dix (10) ans. Prises dans leur ensemble, le Tribunal estime que les conditions de l'accord sont équitables, raisonnables et proportionnelles à la gravité des infractions.
>
> Malgré le sérieux des accusations, l'Accord met en place les mesures nécessaires pour éviter que de tels comportements ne se reproduisent. Les dispositions financières sont suffisamment conséquentes pour dénoncer les actes répréhensibles et tenir les Organisations responsables. De plus, les torts de la victime sont adressés adéquatement.[19]

(vi) Coming in From the Cold: Self-reporting carries considerable weight in a Court's approval of a remediation agreement but is not a mandatory precondition.

The zone of non-discovery is a central concept, in my view, with respect to the concept of deferred prosecutions. The zone of non-discovery is recognized in the purpose section of the legislation that states that a remediation agreement have an objective of "(d) to encourage voluntary disclosure of the wrongdoing." A primary benefit to the government is that organizations come in from the cold in circumstances where the government may never find out about misconduct, and they provide details of an internal investigation into those matters. The primary benefit for the organization is the absence of a criminal conviction and its implications.

It would appear that the factor of "the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities" is not a condition precedent. This conclusion is derived from the placement of this consideration in the factors section as contrasted to the conditions section. The listing of "the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities" as only one factor would appear to make a remedial agreement potentially available to an organization that discloses wrongdoing after being discovered by the government. An organization that is caught could argue that it is not precluded from applying for a remediation agreement, as there is no condition precedent that such agreements are only available to those who report "prior to an imminent threat of disclosure or government investigation".

In SNC-Lavalin Jacques Cartier case, Justice Downs ruled that self-reporting carries considerable weight in a Court's approval of a remediation agreement but is not a mandatory precondition. Strong cooperation, as in the SNC-Lavalin Jacques Cartier case, can also play a role in favour of the Court approving a remediation agreement.

Legislation permitting remediation agreements commenced in force effective on September 21st, 2018. In the SNC-Lavalin matter, it appears that one of the reasons given by the DPP to not offer a remediation agreement was the failure to self-report.[20] This factor is unique in the circumstances, because in 2012 when SNC announced an investigation of $35 million in

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[19] *R. c. SNC-Lavalin inc. 2022 QCCS 1967 at paragraph*s 239-240.

[20] SNC-Lavalin v. DPP Notice of Appeal by SNC-Lavalin, Federal Court of Appeal, Amended Notice of Action, section 43.

undocumented payments, there was no remediation regime and no safe harbour to come into from out of the cold.

Material changes relating to serious alleged bribery require self-reporting. But the absence of a safe harbour at the time would be a factor that should be considered.

(vii) Potential risk analysis in relation to the decision to self-report

To be blunt, if an organization can get a deferred prosecution agreement (remedial agreement) *after* being caught, this may create its own risk dynamic in which an organization will decide to not self-report and hope that they are not caught. If a company is caught, it would then come in and seek a deferred prosecution agreement on the basis of the other factors listed. The company would argue that because self-reporting is not a condition precedent, but only a factor, it should be considered for a remediation agreement based on the balancing of other factors.

I would ***not*** recommend that a corporation undertake this type of risk analysis. The government will likely apply a sliding scale in analyzing the reasons for a failure to report before being discovered. At the low culpability end of the scale are those cases where senior management was not aware of the non-compliance before a search warrant was issued. At the high end of the culpability scale are those cases where senior management was aware of the non-compliance and took the calculated risk to not self-report. The culpability scale will be one of the relevant factors to weigh under factor (a).

There is some precedent in both the United States and the United Kingdom for the granting of deferred prosecutions in cases where a company did not self-report but provided extraordinary co-operation throughout the investigation. In the *Panasonic*[21] case, the company did not receive voluntary disclosure credit because the company's disclosures occurred only after the Securities and Exchange Commission ("SEC") requested documents from Panasonic related to possible violations of anti-corruption laws. This was several years after Panasonic first became aware of the allegations of bribery through a whistleblower complaint and civil lawsuit, which the company took steps to investigate internally but chose not to voluntarily report to the relevant authorities. Panasonic did receive credit for its cooperation with the Fraud Section's investigation, including conducting a thorough internal investigation, voluntarily making U.S. and foreign employees available for interviews and in one instance, proactively alerting the Fraud Section to material information relevant to the investigation and disclosing to the Fraud Section conduct in the Middle East of which the Fraud Section was previously unaware.

Panasonic agreed to disgorge $126,900,000 in profits and in addition pay a monetary penalty in the amount of $137,403,812. The conduct in this case was between 2007 and 2013, wherein employees, including senior executives, engaged in a scheme to retain consultants for improper purposes other than for providing actual consulting services. Through this process, Panasonic or related employees hid more than $7 million in payments to at least thirteen sub-agents, some of which had not passed due diligence checks, by improperly reporting them as legitimate

[21] United States District Court for the District of Columbia Case No. 18-CR-00118, United States of America v. Panasonics Avionics Corporation Filed 04/30/18.

commission payments. The scheme involved payment to foreign officials who had influence in the decision by Middle Eastern airlines to buy Panasonic's entertainment systems.

In the United Kingdom, Rolls Royce was charged with bribery and corruption to secure equipment export contracts, in offences that were persistent and multi-jurisdictional. The charges involved three of the company's major business divisions, and activities in seven countries over a period of 24 years—from 1989 to 2013. Rolls Royce received a deferred prosecution agreement, approved by the court (as is required). Although the company did not self-report the offences, the Serious Fraud Office (SFO) stated that the company provided "extraordinary" co-operation throughout the investigation. The company started its own investigation, reviewed over 250 of its business relationships with third parties and issued regular reports of its findings to the SFO.[22]

(viii) Matrix analysis

The legislation for remediation agreements is complex. The legislation requires consideration of eight plus factors flowing from the six enumerated purposes. Multiple factors inject uncertainty into the process.

The problem with uncertainty is that an organization may be wary of coming in from the cold only to be told that they do not have a warm safe harbour to enter. As a strict matter of law, if an organization is denied a remediation agreement, the information that they provide cannot be used against them. Section 715.34(2) of the *Criminal Code* explicitly protects the negotiating process on the same level of settlement discussions:

> No admission, confession or statement accepting responsibility for a given act or omission made by the organization during the negotiations is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts or admission of responsibility referred to in paragraphs 715.34(1)(a) and (b), if the parties reach an agreement and it is approved by the court.

Despite the protection of the above section, the practical reality is that an organization that comes in from the cold has put itself on the radar of law enforcement. If there is significant uncertainty about whether or not a remediation agreement will be granted, this may be a disincentive to come in.

The first remediation agreement in the SNC-Lavalin Jacques Cartier case is a green light that signals that a remediation agreement may indeed be available, particularly where there is evidence of strong cooperation.

Matrix analysis can assist with analysing the eight factors flowing from the six enumerated purposes.[23] The following illustrates a potential approach:

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[22] https://business.financialpost.com/opinion/whether-snc-lavalin-gets-the-rolls-royce-treatment-is-now-david-lamettis-call.

[23] Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance* (Toronto:Thomson Reuters 2021), Chapter 23 IV, Deferred Prosecution Agreements: the Concept

Impact			
Significant	(e) Provide reparations for harm done		(a) Failure to disclose to authorities from zone of non-discovery increases likelihood of harm
Moderate	(d) Disciplinary action against those involved and (f) Identified persons involved	(b) Accountable through penalties	(b) Gravity of the act and impact on victims
Minor	(a) Early disclosure to authorities reduces likelihood of harm	(c) Degree of involvement of senior officers	(g) Prior record of company and (h) other offences
	Low	*Medium*	*High*
			Likelihood

In the above, the vertical axis represents the impact of harm caused by financial crimes. The horizontal axis represents the likelihood of misconduct being repeated.

Factor (a) and the circumstances of disclosure will inform the interpretation of the other factors. While this factor does not "trump" the other factors, it will impact them. Early self-disclosure, as soon as an organization determines that something is amiss, will minimize any future impact of the illegal act as well as eliminating the potential for a repetition of the conduct. This then impacts the other factors such as reparations for harm done and the gravity of the act and its impact on victims. Conversely, late disclosure of details after the authorities have already discovered the illegal act will not have prevented harm to victims as early as was possible and may have permitted those responsible to repeat the illegal acts. The matrix developed above demonstrates how this factor informs the others.

Toronto Law Journal

A Guide to Cryptocurrencies in Family Law

Angela Huang, Boulby Weinberg LLP

Introduction

As cryptocurrencies are becoming more prevalent, we should understand what they are and how they affect different aspects of family law, such as equalization and support. This article provides an introduction to cryptocurrencies and examines the issues related to cryptocurrencies in family law.

What are cryptocurrencies?

Cryptocurrencies are types of exchange that are created and stored electronically in blockchains with the use of encryption to control the creation of monetary units and to verify the transfer of funds. A blockchain is a distributed digital transaction ledger that keeps a constantly growing list of transactions that are kept in "blocks".[1] Every block has a timestamp along with a link to the block before it. These blocks join in a chronological fashion to create a blockchain. [2]

Cryptocurrencies have a few characteristics: (1) they have no intrinsic value; (2) they have no physical form; and (3) they are part of a decentralized system whereby their supply is not determined by a central bank.[3] Cryptocurrencies are held directly, either in a digital wallet or a cryptoasset exchange wallet, or indirectly through a cryptoasset ETF.[4] There are also many different types of cryptocurrencies, such as bitcoins.

Issues in Family Law

A. Non-disclosure of cryptocurrencies

Some people may use cryptocurrencies to try to hide their assets. It is impossible to know who the owner is without knowing their cryptocurrency's unique private key. One way to find the private keys to cryptocurrencies is by finding the wallet where the private keys are held.[5] This wallet is what the holder of the cryptocurrency utilizes in order to keep track of the private

[1] Judith Alison Lee, Blockchain 101, online: Thomson Reuters [https://legal.thomsonreuters.com/en/insights/articles/blockchain-101].
[2] *Ibid.*
[3] Scott Likens, Making sense of bitcoin and blockchain technology: PwC, online: PwC [https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html].
[4] New Brunswick Financial and Consumer Services Commission, Crypto Assets and Cryptocurrency, online: New Brunswick Financial and Consumer Services Commission [https://www.fcnb.ca/en/investing/high-risk-investments/crypto-assets-and-cryptocurrency].
[5] O'Reilly, Chapter 4: Keys, Addresses, Wallets, online: O'Reilly [https://www.oreilly.com/library/view/mastering-bitcoin/9781491902639/ch04.html].

key.[6] Wallets arehardware or software that keep track of the numbers.[7] People can also write down the number on a piece of paper, but many holders will use an "exchange", which is a third-party service, to store the private keys.[8]

The courts are aware of the issue of non-disclosure of cryptocurrencies. They have made negative findings against a payor who refused to provide disclosure regarding their cryptocurrency holdings. These cases are as follows:

i. In *M.W. v N.L.M.W*, 2021 BCSC 1273, the respondent refused to disclose his cryptocurrency assets and claimed that all evidence related to those assets were lost.[9] The court heard evidence that the respondent had spent a lot of time investing in cryptocurrencies.[10] Justice Veenstra held that $60,000 would be attributed to the cryptocurrency accounts.[11] This finding was based on the evidence that showed that investments in cryptocurrencies were around $100,000 and that there may have been losses. [12]

ii. In *Schiebel v Lumb*, 2021 BCSC 2359, Justice Gaul found that Mr. Schiebel's refusal or inability to explain certain flows of money "reflect[ed] badly on [his] credibility" and demonstrated that he had been "intentionally deceptive" during litigation.[13] Mr. Schieble refused to explain the regular deposits of around $800 into his chequing account and other transfers from his mother's account into his chequing account.[14] He also disclosed for the first time during his testimony at trial that he had invested in cryptocurrencies during his relationship with Ms. Lumb.[15]

iii. In *Kostrinsky v. Nasri*, 2022 ONSC 2926, the applicant was successful in her resulting trust claim in the respondent's investment in bitcoin.[16] The respondent did not include in his NFP cryptocurrency that he owned. The applicant argued that he had used her credit card without her consent to purchase the bitcoin and that as a result of s. 14 of the *Family Act*, the bitcoin belonged to her.[17] She provided calculations of the value of the bitcoin.[18] The respondent admitted in his testimony that he owned the cryptocurrency and also seemed to concede that

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[6] Jake Frankenfield, Crypotcurrency Wallet, online: Investopedia [https://www.investopedia.com/terms/b/bitcoin-wallet.asp].
[7] *Ibid.*
[8] Jake Frankenfield, Private Key, online: Investopedia: [https://www.investopedia.com/terms/p/private-key.asp].
[9] *M.W. v N.L.M.W*, 2021 BCSC 1273, 2021 CarswellBC 2061at para. 361 [*M.W. v N.L.M.W*].
[10] *Ibid* at para. 334.
[11] *Ibid* at para. 361.
[12] *Ibid.*
[13] *Schiebel v Lumb*, 2021 BCSC 2359, 40 A.C.W.S. (3d) 182 at para. 53.
[14] *Ibid.*
[15] *Ibid.*
[16] *Kostrinsky v. Nasri*, 2022 ONSC 2926, 2022 CarswellOnt 7576 at para 163.
[17] *Ibid.*
[18] *Ibid.*

he had bought the bitcoin with the applicant's funds. [19]He did not provide a calculation of the value of the Bitcoin, so Justice O'Brien used the applicant's calculation of the bitcoin to include in the respondent's NFP. [20]

B. Determination of income

Determining someone's income from cryptocurrencies requires more than just proof of capital gains from the sale of cryptocurrencies. In *Hauber v. Sussman*, 2020 ONSC 6695, the mother claimed that for the purposes of child support, the father's income, which was based on a 5-year average and significant capital gain income from the sale of cryptocurrencies, was $3,276,000.[21] The father, on the other hand, alleged that this capital gain income was non-recurring and should be excluded as income for child support. He also claimed that his income should not be averaged to determine child support. The father argued that his business was in the verge of collapse due to the pandemic, leading him to have to use his own capital to sustain the business.[22] His position was that child support should not increase pending trial.[23] Both of the parties retained their own expert reports. Justice Horkins determined that on a temporary motion, section 17 of the *Child Support Guidelines* could not be applied in this situation where the father had significant capital gains throughout the years from the sale of cryptocurrencies.[24] To arrive at this conclusion, Justice Horkins examined the mother's budget, which had indicated that the child's annual expenses were $33,684.[25] Justice Horkins further implied that it would have been helpful for the mother to provide a childcare budget: While not mandatory, a budget is very helpful and important when seeking support from a high-income earner. A budget provides some evidence, albeit imperfect, of a child's needs (see *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] S.C.J. No. 52 at para. 45).[26] The father had also paid nearly all of the child's expenses.[27] Justice Horkins concluded that the characterization of the father's capital gains, the retroactive child support claim, and the issue of the father's income were left to be determined at trial.[28]

Hauber shows that at least on a temporary motion for support, it is not enough to simply claim that as a result of significant capital gains from the sale of cryptocurrencies, a payor's income should be determined under s. 17 of the *Child Support Guidelines*. Lawyers should also provide a childcare budget to support a s. 17 argument.

In *M.M.D. v. J.A.H.*, 2019 ONSC 2208, while Justice Nakonechny agreed with the mother that the father had "more income available to pay child support than is reflected in his 2017 net self-employment income", Justice Nakonechny refused to impute income to the father for a

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[19] *Ibid.*
[20] *Ibid.*
[21] *Hauber v. Sussman*, 2020 ONSC 6695, 326 A.C.W.S. (3d) 639 at paras 5 and 35.
[22] *Ibid* at paras 5 and 6.
[23] *Ibid* at para 6.
[24] *Ibid* at para 46.
[25] *Ibid* at para 47.
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid* at para 48.

temporary order for child support.[29] The father had retained an expert to provide an income report, which was not available at the time of the motion.[30] Justice Nakonechny held that "[w]ithout the benefit of the income valuation and cross examination [..] it would not be appropriate to impute income to the Respondent from his business income or his cryptocurrency."[31] Based on this case, in situations where the payor has significant income from the sale of cryptocurrencies, it would be useful for an income analysis report to be produced.

C. Seizing/Freezing of Cryptocurrencies

The courts have the power to execute and seize digital assets or funds including cryptocurrencies to satisfy a debt. In *Li et al. v. Barber et. al.*, 2022 ONSC 1176, Regional Senior Justice MacLeod heard a motion brought by citizens of Ottawa against organizers, participants, and supporters in the "Freedom Convoy", which had blockaded Ottawa for many weeks.[32] The plaintiffs brought this motion without notice to the defendants as it was the plaintiffs' position that the defendants were going to move assets and if they were aware of the proposed injunction, they would take steps to defeat it.[33] Justice MacLeod ordered a *Mareva* injunction without warning to the defendants.[34] The plaintiff had "clear evidence" that some of the defendants were the owners of digital wallets that had significant cryptocurrencies. [35]

This case can be extended to apply to family law cases. It may be possible for the court to freeze assets related to cryptocurrencies.

Future issues

While the value of cryptocurrencies has had a boom for the past few years, recently their value has dropped significantly. When a support payor's income predominantly from the trade of cryptocurrencies drops in value may support a material change application.

Another issue that has not been dealt by the courts in great detail is the valuation of cryptocurrencies for equalization purposes. There are several methods that can be used to value cryptocurrencies: cost of production (mining costs), income approach (equation of exchange), and market approach (network value to transactions ratio).[36] Each approach has its advantages and shortcomings. For example, the market approach can have limits, such as the

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[29] *M.M.D. v. J.A.H.*, 2019 ONSC 2208, 306 A.C.W.S. (3d) 591 at para. 108.
[30] *Ibid* at para. 38.
[31] *Ibid* at para. 108.
[32] *Li et al. v. Barber et. al.*, 2022 ONSC 1176, 2022 CarswellOnt 2019 at paras 1 and 2.
[33] *Ibid*.
[34] *Ibid* at para. 5.
[35] *Ibid* at para. 24.
[36] Tara K Singh & Tylar St. John, "Decrypting Crypto: An Introduction to Cryptoassets and a Study of Select Valuation Approaches", online: (2019) 207:3 CBV 1 < https://cbvinstitute.com/wp-content/uploads/2019/12/DecryptingCrypto-Final-DIGITAL-VERSION.pdf>.

lack of historical data, while the cost of production approach does not consider transaction fees.

Conclusion

So far, the case law in family law regarding cryptocurrencies is still developing. Clients must provide disclosure regarding cryptocurrencies that they hold and earn income from. Family lawyers should ask their clients whether they have income or assets from cryptocurrencies. If the clients do have cryptocurrencies, request clients to provide regular and ongoing downloads of wallet/exchange transaction activity. Clients should also provide the source of funding for cryptocurrency transactions through bank statements, line of credit statements, credit card statements, and PayPal activity. If clients refuse to provide disclosure related to their cryptocurrency holdings and/or income, the court can make negative findings against them. Moreover, holders of cryptocurrencies may need to retain a business valuator to determine their income and the value of the cryptocurrencies. Finally, the court can freeze digital assets including cryptocurrencies.

In many respects cryptocurrencies are treated in a similar fashion to other types of assets for support or property purposes. Cryptocurrencies are different due to the lack of regulations, opportunities of the owner of cryptocurrencies to conceal their holdings, and the volatility of this asset's value. Cryptocurrencies also raise exceptional challenges to disclosure and enforcement in family law.

Toronto Law Journal

The Stanley Cup: The Unintended Legal Impacts of Hockey's Greatest Prize

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"In summertime village cricket is the delight of everyone."[2] Lord Denning's colourful opening to *Miller v Jackson* is known by all who have studied law in Canada and is perhaps the most well-known example of the impact of sports on the common law. But it should come as little surprise to anyone in Canada that a different Lord would have a more extensive role in our jurisprudence.

In 1893, Frederick Stanley, 16th Earl of Derby and formerly Governor General of Canada – but more commonly known to hockey fans everywhere as "Lord Stanley" – donated a silver rose bowl to be awarded to the winner of the Dominion Hockey Challenge. Nearly 130 years later, the Stanley Cup continues to be a part of the fabric of Canadian society. Given its prominence in the minds of Canadians, it is of little surprise that the Stanley Cup has found its way into nearly every aspect of Canadian jurisprudence:

- *Criminal Law* – The Alberta Queen's Bench commented that the venue in which someone convicted of sexual assault serves their conditional sentence was as important as the term: "[I]t cannot be disputed that there is a dramatic qualitative difference between a conditional sentence served in one's home or in the community and one actually served in prison. Indeed, the difference is so great that there is hardly a comparison. To illustrate, one need only think of Kain serving his sentence at home, watching the Stanley Cup Playoffs on a large-screen colour t.v., yelling to his roommate to get him another beer while he's up; and then think of David, who at the same time was serving his sentence in prison, not able to watch the hockey game because it was on after lights-out and not able to ask his cell-mate for a beer."[3] The riots that followed the Vancouver Canucks' Stanley Cup losses to the Rangers (1994) and Bruins (2011) yielded a large number of reported decisions.

- *Tax Law* – The tax court has considered whether pension income received from the National Hockey League Pension Society located in Montreal was taxable in Canada for players who spent their entire careers playing for American teams. The challenge of making and succeeding in the playoffs was noted: "Even for players like the Appellants, who had exceptionally long professional sports careers, playoffs occur by chance. Making playoffs depends on coaches, other players, a lack of serious injuries and other teams'

[1] Special thanks to Leo Rebello, Student-At-Law at Dutton Brock LLP for his research and to Randy Maniloff, "NCAA Tournament and Courts (Of Law)", Coverage Opinions, Vol 6, Iss 3 for inspiring this article.
[2] *Miller v Jackson*, [1977] EWCA Civ 6, para 1.
[3] *R v Charters*, 2004 ABQB 533, para 39 per Martin J., as he was then.

successes or failures. At times the Appellants made the playoffs, but at other times they didn't, despite their plans, skills and hard work."[4]

- *Family Law* – NHL players are not immune from the breakdown of a marriage. Dave Bolland, who scored the Stanley Cup-winning goal for the Chicago Blackhawks in 2013, raised issues of residency and jurisdiction.[5] Meanwhile, Chris Simon, who was a member of the 1996 champion Colorado Avalanche, was ordered to pay increased child support after a significant increase in his playing salary.[6]

It is tort law that the impact of the Stanley Cup on Canadian culture can be seen most significantly. Unsurprisingly, alcohol has played a role in many incidents which occurred following a Stanley Cup finals game. An intoxicated pedestrian was struck and seriously injured on his way home by a driver who had himself been drinking after watching the Calgary Flames and the Tampa Bay Lightning on TV in 2004.[7] Two men were involved in a single vehicle collision after watching the 2012 Finals between the Los Angeles Kings and the New Jersey Devils at a local restaurant. Both the plaintiff passenger and the defendant driver had been overserved by the restaurant, which was offering a draft beer special.[8]

Not all of the relevant tort cases involve inebriated fans. Joshua Morrow was drafted by the Nashville Predators in 2002 but his hockey career ended prematurely due to a medical error while undergoing shoulder surgery.[9] The Supreme Court of British Columbia was required to quantify the past and future income loss in the context of a medical malpractice claim. The court noted the difficulty assessing hypothetical earnings given the uncertainty in a young hockey player's career trajectory, particularly when even "those highly skilled in the area have difficulty predicting an outcome for a player".[10] To illustrate the point, the court took judicial notice that Martin St. Louis, 2004 Stanley Cup champion on the Tampa Bay Lightning, has enjoyed a highly successful career despite never being drafted in the NHL.[11]

However, the top Stanley Cup references were undoubtedly scored at the expense of the Toronto Maple Leafs. Faced with a motion to dismiss a civil action for delay 22 years after it was commenced, Justice Paul Howard provided a recap of the events that shaped the world in

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[4] *Nanne and Mikita* v *The Queen*, [1999] TCJ No 871, para 15. Nikolai Khabibulin, the starting goaltender for the 2004 Stanley Cup champion Tampa Bay Lighting is the subject of another notable tax case involving the taxation of a signing bonus and the application of the Canada/USSR Income Tax Convention. See *Khabibulin v The Queen* (1999), [2000] 1 CTC 2061.

[5] *Bolland v Bolland*, 2016 ONSC 4390.

[6] *Simon v Simon* (1999), 46 OR (3d) 349 (CA), leave to appeal to SCC refused.

[7] *Knibb v Foran*, 2017 ABQB 375.

[8] *Hummel v Jantzi*, 2019 ONSC 3571.

[9] *Morrow v Outerbridge*, 2009 BCSC 433. See *Mori v Weeks*, 2001 BSC 1094 in which the court found that the evidence of the plaintiff's prospects of playing professional hockey were not established but nonetheless awarded $25,000 in non-pecuniary damages for the plaintiff's loss of opportunity to continue his hockey career. See also *Saunders v Rempel*, 2019 BCSC 2177, paras 44 - 49.

[10] *Morrow v Outerbridge*, 2009 BCSC 433, para 268.

[11] In addition to winning the Stanley Cup, Martin St. Louis was the NHL's leading scorer on two occasions, won the Hart Trophy for the most valuable player, the Lester B. Pearson award for peer-chosen most valuable player, and Lady Byng Memorial Trophy for most gentlemanly player on three occasions, played in six all-star games, won an Olympic Gold Medal and was elected to the Hockey Hall of Fame in 2018.

1993 - the brief tenure of Prime Minister Kim Campbell, the finale of Cheers, the first public access to the World Wide Web and the Blue Jays' second World Series Championship.[12] But his comments on the state of the NHL best demonstrated the passage of time – and perhaps His Honour's personal frustrations:

> The Toronto Maple Leafs had lost the conference finals earlier that spring, four games to three, to the Los Angeles Kings, who themselves were defeated by the Montreal Canadiens in the next and final round of the Stanley Cup playoffs. (Leaf fans had only just begun to learn to use decades to count the intervals since their team had last won the Cup.)[13]

Similarly, Justice Jody Fraser of the Court of Queen's Bench of Alberta commented on the Maple Leafs' lack of recent Stanley Cup success when discussing the challenges of defining "reasonable and probable grounds" in the context of an arrest and the issuance of a search warrant. His Honour held: "Where exactly it lies between a balance of probabilities and a reasonable suspicion is still a topic of debate. It may be similar to debating how many angels can dance on the head of a pin, or if the Leafs will ever win another Stanley Cup."[14]

So while nearly every village in the UK may have its own cricket field where the young men play and the old men watch, an entire nation remains fixated on the holy grail of hockey, Lord Stanley's Cup.

[12] "Touch 'em all Joe!" per Tom Cheek.
[13] *Meriano v Benoot*, 2016 ONSC 4839, para 6.
[14] *R v Gomez*, 2020 ABQB 439, para 50.