REFLECTIONS ON THE DIVERSITY OF LEGAL TRADITIONS IN CANADIAN LAW*

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I. Introductory Remarks

Good afternoon, and thank you Professor La Forest for the kind introduction. Thank you also for the invitation to present the Viscount Bennett Memorial Lecture. It is a real privilege for me to be here. The Right Honourable Viscount Bennett led Canada through some of the most challenging years of the depression. He did so with courage and determination. As an elected official, and later Prime Minister of Canada, he also helped put social policies and institutions in place. These include the Bank of Canada and the CBC, which continue to serve our country today. He also hoped, through this lecture series, to promote a greater appreciation of the law in contemporary Canadian society. I am pleased to be a part of that effort because I agree that the law plays a very important role in society.

Je suis ravi de le faire ici, à l'Université du Nouveau-Brunswick, où tant de distingués juristes ont amorcé leur carrière juridique. Le nom de l'honorable Gérard La Forest figure, comme vous le savez toutes et tous, sur la longue liste des éminents diplômés de cette institution. Le juge La Forest m'a précédé au sein de la Cour suprême, mais sa jurisprudence continue, à ce jour, d'influencer les travaux de la Cour et elle continue d'influencer la société canadienne en général, tout comme le fait l'œuvre du vicomte Bennett à d'autres égards.

In these uncertain times, I have been thinking a great deal about the role of the law. On the morning of March 15th, I was sitting in the House of Commons when the Ukrainian President, Mr. Zelensky, addressed parliamentarians. The House of Commons was absolutely silent as he asked Canadians to imagine bombs falling on our cities and our homes. The President said, and I quote, "We're not asking for much. We're just asking for justice (…)".

Indeed, under the most horrific conditions, the Ukrainian government has sought a legal means to end the violence. For example, it has taken Russia to the International Court of Justice (the ICJ). Even when Russia did not show up for the hearing, Ukraine said it still had faith in the law. At the end of that court proceeding, the ICJ ordered Russia to stop the invasion,[1] but as we all know, it has not stopped.

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[1] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Order of 16 March 2022, online: <https://www.icj-cij.org/en/decisions/order/2022/2022/desc> [perma.cc/46XG-3RS2].

Yet again, Ukraine said it still believed in the importance of the rule of law. That conviction inspires me, and gives me hope for the future.

We can all play a part in making the future better, which is the spirit of this lecture series. After all, it is not just for the courts to uphold the rule of law. Everyone can play a part. How? Well, take the time to share your knowledge about Canada's laws and legal system. Learn how to identify and stop the spread of misinformation and disinformation. We have seen how the spread of lies, even half-truths, can threaten democratic institutions around the world. In Canada, our courts are open, impartial and independent. Our justice system is strong and stable. These make up the foundation of a healthy democracy, which is something we should never take for granted.

We are lucky to live in this country. Canada may not be an economic or military superpower, but it certainly is a democratic superpower. And we like to share that power! We did so, for example, with Ukraine. For many years, Canadian judges and staff from all court levels have worked closely with Ukrainian judges and their own staff to help them improve their judicial system. For example, we have helped them improve their processes for the selection and appointment of judges, for managing conflicts of interest, for processing cases, and even for judgment writing. Once the invasion ends, we will still be there, standing with Ukrainians, to help them restore their judicial system.

Canada can indeed be proud of its laws and legal institutions. They reflect the diversity of its people, as well as their different legal traditions. This includes the common law and civil law, and even longer-standing Indigenous traditions. Canadian law is also influenced by international law.

I would like us to consider this diversity of legal traditions together this afternoon. I propose to review some cases from each of these sources to explain how they influence one another. All of these cases will be different. I will start with a common law case where the civil law concept of good faith was considered. I will also explain a case involving an Aboriginal title claim. And I will end with a lawsuit against a Canadian mining company for violations of customary international law. You might think that these cases have nothing in common. But they do. They all demonstrate how Canadian law has many sources.

II. Historical Context

Let me pause here to make a quick point. I will be referring this afternoon to Indigenous law. By this, I mean the law developed by Indigenous peoples.[2]

Through history, Indigenous and non-Indigenous peoples maintained their own legal traditions. But with time, legislative drafters began to recognize more than one legal tradition. We can see two legal traditions reflected, for example, in the

[2] Andrée Lajoie, "Introduction: Which Way Out of Colonialism" in Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007), at 3.

enabling statute of the Supreme Court of Canada. Being a court of appeal for the entire country, the Supreme Court is responsible for deciding some cases according to the common law and some according to the Quebec civil law. The original *Supreme Court Act* required two of the six judges of the Court to be from Quebec.[3] As the size of the bench grew, so did the number of judges from Quebec.[4] There are currently nine judges on the Court, three of whom are Québécois. This ensures both common law and civil law representation on the Court.

The *Constitution Act, 1982* is another example of legislation that recognizes more than one legal tradition within Canada. When it was adopted, it provided constitutional recognition of Aboriginal and treaty rights. Section 35(1) says explicitly that Aboriginal and treaty rights were being recognized at the time.[5] In the decades since 1982, the Supreme Court has also recognized the importance of Indigenous perspectives on the law in its section 35 jurisprudence, particularly in areas directly applicable to Indigenous Peoples.

With the *Constitution Act, 1982* came the *Canadian Charter of Rights and Freedoms*.[6] The *Charter* is inspired by various international treaties, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.[7] It is perhaps no surprise that the influence of international law has been especially noticeable since the *Charter*. We can see this influence in both the case law and federal legislation, including in international trade, taxation, maritime law, environmental law and other areas.[8]

Today, Canadian lawyers and judges increasingly draw on civil law, the common law, Indigenous legal traditions and international law. As a judge of the Supreme Court of Canada, and now as Chief Justice, I can see this first-hand. As I mentioned earlier, the Court is composed of judges trained in civil law and others in the common law. In our exchanges, we often draw from both legal traditions. Also, we will often hear submissions from parties and interveners trained in either or both traditions, or trained in Indigenous legal traditions, or practicing international law. They provide us with perspectives from these various legal traditions, which are very helpful when they differ from the law-in-force in a given case. Drawing on these different perspectives and applying them where appropriate can inform a legal issue.

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[3] *Supreme and Exchequer Court Act*, SC 1875, c 11, s 4.

[4] The balance was temporarily distorted in 1927 when one judge was added to the Court without providing that it be filled by a member of the Quebec bench or bar: *Act to amend the Supreme Court Act*, SC 1926-27, c 38, s 1; *Supreme Court Act*, RSC 1927, c 35, ss 4, 6. The balance was restored in 1949 when the number of judges on the Court increased to nine: *An Act to Amend the Supreme Court Act*, SC 1949 (2nd Sess), c 37, s 1.

[5] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[6] *Ibid.*

[7] *Cf* 7th Triennial Conference of the ACCPUF, *La suprématie de la Constitution* (Lausanne, Switzerland: April 2015).

[8] Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53:4 McGill LJ 573 at 578–79.

It enables my colleagues and me to consider perspectives developed by all the people we were appointed to serve.

The existence of different legal traditions is one of the strengths of the Canadian legal system. It allows us to draw on more than one perspective when addressing a legal problem. Let me now explain how the Supreme Court of Canada has done this in different cases.

III. The Callow Case: An example of the civil law informing common law

I will begin with a case decided under the common law, but in which the Supreme Court considered civil law sources from Quebec to resolve the matter.

It was the *Callow* case, which was decided by the Supreme Court in late 2020.[9] The case came up from Ontario. For those who do not know the facts, let me explain them. In 2012, a condo corporation called Baycrest entered into a two-year winter-maintenance-contract and a separate summer-maintenance-contract with a company owned by Mr. Callow. According to clause nine of the winter contract, Baycrest could end it if Mr. Callow did not provide good service. It could also end the contract for any other reason by giving Mr. Callow 10 days' written notice.

In early 2013, Baycrest decided to end the winter contract but did not inform Mr. Callow. Throughout the spring and summer of 2013, Mr. Callow and Baycrest discussed the renewal of that contract. From those discussions, Mr. Callow thought Baycrest was satisfied with his services and was likely to offer him a 2-year renewal. During that time, Mr. Callow performed work above and beyond the summer contract at no charge. He hoped that this would convince Baycrest to renew the winter contract. But in the fall of 2013, Baycrest told Mr. Callow that it was not renewing it. Mr. Callow sued, alleging that Baycrest acted in bad faith. The trial judge sided with Baycrest, but then the Court of Appeal sided with Mr. Callow.

A majority of the Supreme Court agreed with Mr. Callow. Justice Kasirer wrote for the majority and said that Baycrest breached its duty to act honestly toward Mr. Callow. As Justice Kasirer explained, the duty of honest performance did not require Baycrest to tell Mr. Callow that they would end the contract early. But it did require the company not to mislead him.

Even though this case was decided under Ontario law, the majority of judges considered civil law sources from Quebec. While the requirements of honest contractual performance in the two legal traditions have distinct histories, they address similar issues.[10]

So, looking to Quebec law can be very helpful. The Court has often done this over the years, not just in appeals from Quebec or in matters relating to federal

[9] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.

[10] *Ibid* at para 72.

legislation.[11] The *Callow* case is a good example of this. It is from Ontario, and does not relate to federal legislation.

Just remember that this exercise is not limited to cases where there is a gap in the law.[12] As Justice Kasirer wrote in *Callow*, not considering solutions from other legal traditions would limit the Court's ability to understand how problems are addressed elsewhere in Canada.[13] What do you think? Is there any downside to considering helpful material from other legal traditions?

IV. The *Tsilhqot'in* Case: An example of the Supreme Court referencing both the common law and Indigenous perspectives

Let me now turn to Indigenous perspectives and explain how they, too, have informed legal issues. I will be taking Aboriginal title as an example to illustrate this. Aboriginal title refers to the exclusive right to use a particular territory.

This concept has become important in Canadian jurisprudence. But the story began almost 50 years ago, with the Supreme Court's decision in *Calder*.[14] The appellants were asking the Court to declare that their Aboriginal title had not been extinguished. Although they were unsuccessful, all of the judges on the Court recognized the possibility of the existence of Aboriginal title.

In the years since *Calder*, there have been other cases where the Supreme Court has discussed Aboriginal title. In *Delgamuukw*, the Court set out the test for evaluating Aboriginal title, but decided that there was not enough evidence in that case to establish the claim.[15]

So, while the test was set out in *Delgamuukw*, it was only in 2014, in the *Tsilhqot'in* case, that the Supreme Court upheld a declaration of Aboriginal title for the first time.[16] The Tsilhqot'in Nation is a semi-nomadic group of six bands that share a common culture and history. For centuries, they have lived in central British Columbia. In 1983, British Columbia allowed logging in that area. The band tried to stop the logging, claiming Aboriginal title to the land. The federal and provincial governments opposed the claim. The trial judge found the Tsilhqot'in had proved Aboriginal title, but the Court of Appeal reversed that decision.

A unanimous Supreme Court agreed with the trial judge. What is important for you to remember is this: the Supreme Court said to look to the Aboriginal culture and practices, and compare them in a culturally sensitive way with what is required at

[11] *Ibid* at paras 57–58.

[12] *Ibid* at para 59.

[13] *Ibid* at para 58.

[14] *Calder et al v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

[15] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

[16] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

common law to establish title based on occupation. In other words, Aboriginal title must be understood by reference to both common law and Aboriginal perspectives.[17]

While the decisions in *Calder*, *Delgamuukw* and *Tsilhqot'in* acknowledged the relevance of Indigenous perspectives, they did not turn on Indigenous law. Recognizing the existence of Indigenous legal traditions is a relatively modern development in Canadian legal history.

V. From *Baker* to *Nevsun*: The application of international law within Canadian law

International law is also an important source in Canada. We can see this from a recent case called *Nevsun*. It was decided by the Supreme Court in 2020.[18] The case involved three Eritrean workers. Their country has a national service program. All Eritreans have to do military training or other public service when they turn 18. They are often forced to continue that work for many years afterward. The three workers helped build a mine, which is partly owned by a Canadian company called Nevsun. The workers sued Nevsun for forced labour and other crimes against humanity. They said that those crimes were violations of customary international law and that Canadian courts should hold Nevsun responsible. Nevsun brought a motion to strike the proceedings. It argued that it could not be sued for violating customary international law. The chambers judge dismissed Nevsun's motion to strike, and the Court of Appeal agreed.

A majority of the Supreme Court also agreed. They explained that customary international law is the common law of the international legal system. They also explained that in Canada, we automatically incorporate customary international law into domestic law without any need for legislative action. This is known as the doctrine of adoption. The fact that customary international law is part of our common law means that it must be treated with the same respect.

In *Nevsun*, the Court did not decide whether the company violated the workers' rights. That question was not before our Court. The question was simply whether the workers' lawsuit could proceed. Since customary international law is part of Canadian common law, the Court said that a Canadian company could be held responsible for violating it. As a result, the lawsuit could indeed proceed. And not to leave any of you hanging, I will tell you how that story ended. A few months after the Supreme Court decision, the parties settled. It was reported that Nevsun agreed to pay an undisclosed but what, I understand, was a significant amount of money to the workers.[19]

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[17] *Ibid*.

[18] *Nevsun Resoucres Ltd. v Araya*, 2020 SCC 5.

[19] Amnesty International, News Release, "Amnesty International applauds settlement in landmark Nevsun Resources mining case" (23 October 2020), online: <https://www.amnesty.ca/news/amnesty-international-applauds-settlement-in-landmark-nevsun-resources-mining-case/> [perma.cc/N3QK-H6KN].

Nevsun is one example of the application of international law within Canadian law. I will leave you to read up on the others.

VI. Conclusion

This brief overview of the Supreme Court's jurisprudence was not intended to be exhaustive. I could have given you many more examples from each source of law. But time does not allow. In the years ahead, the Court will consider more cases like these. So, there will be even more opportunities for dialogue between the different sources of law.

Par le dialogue, nous sommes davantage en mesure de comprendre chacune de ces traditions juridiques ou sources de droit. Et davantage aptes à reconnaître les occasions où une ou plusieurs d'entre elles permettent d'éclairer une question de droit. Autrement dit, il y a plus qu'une perspective susceptible d'aider à résoudre un problème juridique. Au cours des prochaines années, la common law et le droit civil, tout comme les traditions autochtones et le droit international, continueront d'évoluer. Certes, ces sources et traditions évolueront séparément, selon leurs propres besoins et contextes, mais elles évolueront également en raison de l'influence qu'elles ont les unes sur les autres.