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The Enduring Evil of Slavery and the Emergence of Transnational Corporate Law: *Araya v. Nevsun Resources Ltd.*

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After all, this is British Columbia, Canada; and it is 2016.[1]

In *Araya v. Nevsun Resources Ltd.*[2] the B.C. Supreme Court allowed the claims of three Eritrean refugees alleging the systemic use of forced labour and torture at a British Columbian mining company's operation in Eritrea to proceed before the B.C. Supreme Court. The Court's decision in *Nevsun* is of considerable importance, not only for its *forum non conveniens* analysis, but also because of the convergence in *Nevsun* of customary international law and private law claims made in respect of alleged corporate violations of human rights, what might be characterized as "transnational corporate law." Read narrowly, the Court's decision in *Nevsun* stands merely for the proposition that Nevsun failed to establish that the Eritrean plaintiffs' transnational corporate law claims "have no reasonable likelihood of success."[3] Read more expansively, however, the Court's decision signals a judicial openness to claims of transnational corporate liability for violations of human rights. Indeed, not only does the Court note that "[a]ctions that yesterday were deemed hopeless may tomorrow succeed",[4] the Court appears to subtly suggest that such actions *ought* to succeed. After all, this is Canada, and it is 2016.

Background Facts

Nevsun is incorporated under the B.C. *Business Corporations Act*; its head office is in Vancouver, and its shares are widely held and listed for trading on the Toronto Stock Exchange and the New York Stock Exchange. Through its majority representation on the board of the Bisha Mining Share Company (Bisha), an Eritrean entity that directly owns and operates the Bisha Mine in Eritrea where the alleged human rights violations occurred, "Nevsun is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation."[5] The Bisha Mine, which

[1] *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at para 421 [emphasis added] [*Nevsun*].
[2] *Ibid.*
[3] *Ibid* at para 429.
[4] *Ibid* at para 465, quoting *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at para 21 [*Imperial Tobacco*].
[5] *Ibid* at para 52, quoting from Nevsun's Management Discussion and Analysis third quarter report for 2013.

contains gold, copper, and zinc, was opened in 2008, and is the first modern operating mine in Eritrea.[6]

Bisha engaged SENET, a South African company, as the engineering, procurement, and construction manager for the construction of the Bisha Mine. SENET, in turn, entered into subcontracts on behalf of Bisha, including Segen and Mereb, Eritrean contractors; SENET directly supervised Segen's work.[7]

The Eritrean plaintiffs allege that Nevsun orchestrated a nexus of contractual relationships to develop the Bisha Mine. Specifically, they allege that Nevsun engaged Segen, Mereb, and the Eritrean military, to construct infrastructure and mining facilities at the Bisha Mine. Crucially, the plaintiffs allege that Segen, Mereb, and the Eritrean military through its National Service Program deployed conscripted, forced labour obtained from the plaintiffs.[8] According to the Eritrean plaintiffs, the National Service Program provides forced labour to various private enterprises – including both Segen and Mereb – owned by senior military officials.[9] This claim is corroborated indirectly by the NGO Human Rights Watch, which reported in the mid-2000s that Eritrean national conscripts were forced to work on public works and farms owned by senior officials of the military and the country's sole political party.[10]

Human Rights Watch further reported in 2006 that individuals apprehended after fleeing national service in Eritrea are frequently tortured, a finding corroborated by a 2008 report of the U.S. State Department and a further report of Human Rights Watch released in 2009 which further observed that those caught after attempting to escape conscripted military labour are detained without charge or trial, and are treated as deserters under military law.[11]

The plaintiff Kesete Tekle Fshazion claims that he was not permitted to leave the National Service Program after already having served for six years, whereupon he was deployed by Segen to the Bisha Mine; he escaped the mine and Eritrea in 2012. The plaintiff Gize Yebeyo Araya also claims to not have been released from the program after 18 months of training, whereupon he was instead deployed to the Bisha Mine by Segen to work in the mine's tailings management facility until October 2010. The plaintiff Mihretab Yemane Tekle claims that he was not released after his 18 months of service and that he was forced to work at the Bisha Mine until October 2010.[12]

According to Mr. Tekle, the temperature at the location where he and his co-workers were deployed to lay large, black plastic sheets reached 47 degrees Celsius, and that they were fully exposed to the sun. Mr. Araya claims that this heat and exposure

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[6] *Ibid* at para 33.
[7] *Ibid* at paras 34-35.
[8] *Ibid* at para 37.
[9] *Ibid* at para 28.
[10] *Ibid.*
[11] *Ibid* at para 31.
[12] *Ibid* at para 44.

scarred his face, and that he witnessed others receiving punishment by beating, being made to roll or run in hot sand, and being bound with their hands and feet tied together behind the back and left exposed to the sun for hours at a time. Both Mr. Araya and Mr. Tekle assert that they were forced to work six days a week, generally being woken at 4:00 am, working 12 hours a day, and being given very little food throughout the day. They were housed in huts lacking beds, or electricity.[13]

Nevsun sought to stay the proceedings both on the basis of *forum non conveniens* and its argument that the plaintiffs' claims of corporate liability arising out of violations of customary international law are not justiciable. These issues are discussed in turn below.

Forum Non Conveniens

The B.C. Supreme Court has presumptive jurisdiction over the Eritrean plaintiffs' claims by virtue of Nevsun's incorporation and head office presence in the province. Nevsun moved for a stay of proceedings pursuant to the B.C. *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*) on the ground that the courts of Eritrea are a more appropriate forum.[14]

Following the Supreme Court of Canada's decision in *Club Resorts Ltd. v. Van Breda*,[15] defendants seeking to stay proceedings on the basis of *forum non conveniens* must establish that an alternate forum is clearly more appropriate and should be preferred.[16]

Conversely, as Gerow J. observed in the related case of *Garcia v. Tahoe Resources Inc.*, "the public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is *incapable* of providing justice to its own citizens. To hold otherwise is to ignore the principle of comity and risk that other jurisdictions will treat the Canadian judicial system with similar disregard."[17]

In *Nevsun,* the Court found that Nevsun failed to establish that Eritrea is the more appropriate forum to resolve the plaintiffs' claims.[18] In reaching this conclusion, the Court relied on the plaintiffs' evidence that (1) the plaintiffs may be considered traitors in Eritrea, and therefore practically precluded from returning to Eritrea, let alone pursuing a legal action there; (2) the Eritrean military refuses to cooperate in the judicial process, and will not make its personnel available to testify; and (3) both witnesses and legal counsel in Eritrea may be subject to internal travel restrictions.[19]

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[13] *Ibid* at paras 45-46.
[14] *Ibid* at paras 226-27.
[15] *Club Resorts Ltd. v. Van Breda,* [2012] 1 S.C.R. 572.
[16] *Ibid* at para 103.
[17] *Garcia v. Tahoe Resources Inc.,* 2015 BCSC 2045 at para 105 [emphasis added] [*Tahoe Resources*].
[18] *Nevsun, supra* note 1 at para 338.
[19] *Ibid* at para 247.

Moreover, the Court found that Nevsun failed to establish – as was its burden – that there is a system in place in Eritrea allowing for proper documentary disclosure, or to demonstrate how the evidence would be made available in a court proceeding in that country. Further, it turns out that Nevsun's own expert, Professor Senai Wolde-Ab Andemariam, an assistant professor of law at the University of Asmara's Faculty of Law and former regional and district court judge in Eritrea, recently commented on "the problems and inconsistencies in the admission, analysis and weighing of evidence" in Eritrean courts in the absence of comprehensive evidence legislation, including the absence of a framework for the admission of foreign documents or testimony into evidence.[20]

In reaching its conclusion on the *forum non conveniens* application, the Court in *Nevsun* further found "that there is a real risk to the plaintiffs of an unfair trial occurring in Eritrea."[21]

Towards a Transnational Corporate Law?

Even on the relatively cautious approach to comity adopted by the Court in *Nevsun*, its dismissal of the *forum non conveniens* application is hardly controversial. There is little if any evidence to suggest that Eritrea would be willing or even able to provide the plaintiffs with a fair trial. Moreover, the Court in *Nevsun* easily and rightly distinguished its earlier ruling in *Tahoe Resources*,[22] which involved alleged human rights violations at a mining operation in Guatemala where the plaintiffs were Guatemalan residents, not refugees who had fled the country having made allegations of persecution and repression, and where at the time of the *forum non conveniens* motion the plaintiffs were also civil claimants in Guatemala represented by *pro bono* legal counsel in respect of the criminal proceedings commenced against the head of Tahoe Resources Inc.'s security forces at the Guatemalan mine.[23]

Far less straightforward is the plaintiffs' argument in *Nevsun* that a Canadian-owned corporation is liable for breaches of customary international law, specifically the peremptory norms of international law – *jus cogens* – prohibiting slavery, forced labour, torture, and others. As Justice LeBel explained in *R. v. Hape*, "[a]bsent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law *and the development of the common law*."[24]

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[20] *Ibid*.
[21] *Ibid* at para 296.
[22] *Tahoe Resources, supra* note 17.
[23] *Nevsun, supra* note 1 at para 261.
[24] *R. v. Hape,* [2007] 2 S.C.R. 292 at para 39 [emphasis added].

While no civil claims alleging breaches of customary international law norms – peremptory or otherwise – have been successfully advanced in Canada, as the Supreme Court observed in *Imperial Tobacco,* "[t]he law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed."[25]

The Court in *Nevsun* was correct to find that it would have be premature to conclude that the Eritrean plaintiffs' application of the peremptory norms of international law to Nevsun's domestic and foreign conduct must fail. After all, even after the U.S. Supreme Court's questionable and deliberately incomplete ruling in *Kiobel v. Royal Dutch Petroleum,* where the Court found that the presumption against the extraterritorial application of U.S. law applies to certain claims made under the *Alien Tort Statute*,[26] the U.S. Court of Appeal for the Ninth Circuit found in *Doe v. Nestle USA Inc.* that "there are no rules exempting acts of enslavement carried out on behalf of a corporation."[27]

How the Circuit Court was able to reach this conclusion in the face of the U.S. Supreme Court's ruling in *Kiobel* is of particular importance to the eventual merits of *Nevsun*. In *Kiobel*, the U.S. Supreme Court deliberately left open a number of significant questions regarding the reach and interpretation of the *Alien Tort Statute*.[28] In particular, the Court articulated a new "touch and concern" test for determining when it is permissible for an *Alien Torts Statute* plaintiff to claim the extraterritorial application of U.S. federal law. However, the Court did not spell out the nature of the new "touch and concern" test other than to say that it will not be met when an *Alien Tort Statute* plaintiff asserts a cause of action against a foreign company based solely on foreign conduct.[29] In *Kiobel*, the defendant corporations were foreign corporations whose only connection to the United States was their presence there, and all of the alleged breaches of customary international law occurred outside of the United States. In *Nestle*, by contrast, the plaintiffs allege that the relevant conduct partly occurred in the United States. Accordingly, the presumption against the extraterritorial application of U.S. federal law is neither automatically nor necessarily triggered, as the new "touch and concern" test may apply to the facts at bar.[30]

In *Nevsun*, the plaintiffs similarly advance separate claims in respect of conduct originating in Nevsun's corporate offices in British Columbia relating to Nevsun's alleged breaches of the International Finance Corporation (IFC) standards on labour practices and working conditions, which Nevsun agrees it should follow.[31] Notably, Nevsun's voluntary adoption of the IFC standards obligates it to (1) protect workers by addressing forced labour risks; (2) use commercially reasonable efforts to protect

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[25] *Imperial Tobacco, supra* note 4 at para 21.
[26] *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (2013) [*Kiobel*].
[27] *Doe v. Nestle USA Inc.,* 766 F. 3d 1013 at 1022 (9th Cir. 2014) [*Nestle*].
[28] *Kiobel, supra* note 26 at 1669 per Kennedy J., concurring.
[29] *Ibid.*
[30] *Nestle, supra* note 27 at 1029.
[31] *Nevsun, supra* note 1 at para 418.

workers of contractors; (3) use commercially reasonable efforts to ensure that contractors are reputable and legitimate enterprises; and (4) use commercially reasonable efforts to require contractors to abide by the IFC standards including the prohibition on forced labour.[32] Accordingly, the limiting logic articulated in *Kiobel* is wholly inapplicable to *Nevsun*.

Still more important is the inescapable fact that corporate liability for violations of customary international law – transnational corporate law – is an idea whose time has come. The Honourable Justice Ian Binnie initially put the issue this way:

> When the reach of business operations was more or less coextensive with the nation states in which they resided, there was no doubt which state was in charge, although in practice the control may have been imperfectly exercised. *Today, however, transnational companies have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood*. This has created a challenge for the international community as it seeks to develop remedies for harms rising out of the involvement of such companies in human rights abuses …[33]

Later, Binnie put a finer point on the problem:

> Canadian courts have an undistinguished record in coming to the assistance of people who have suffered physical injury, loss of land or serious environmental damage as a result of activities of Canadian companies abroad. Proposed legislative measures have also been unsuccessful. *Prudence and caution are sometimes admirable judicial qualities, but not when it comes to studied inertia in adapting old legal principles to deal with new realities at home or abroad*.[34]

Far from being yet another example of the Canadian judiciary's "studied inertia" in respect of transnational corporate liability for human rights violations, the B.C. Supreme Court's decision in *Nevsun* is a creative and courageous example of the judiciary's role and responsibility in developing the common law. The Court began its reasons for judgment by remarking that the plaintiffs, "who are refugees from the State of Eritrea … *make allegations of the most serious nature* against the defendant

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[32] *Ibid* at para 53.
[33] Hon. Ian Binnie, C.C., Q.C., "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report" (2009) 38:4 The Brief 44 at 45 [emphasis added].
[34] Hon. Ian Binnie, C.C., Q.C., "Foreword" in Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, human rights, and the home state advantage* (New York: Routledge, 2014) at xii [emphasis added].

Nevsun".[35] And the Court concluded in respect of the Eritrean plaintiffs' "most serious" transnational corporate law claims that "a real issue exists, one which has a reasonable chance of success … and should proceed to trial…. This is necessary such that the common law and the law of tort may evolve in an appropriate manner."[36]

Conclusion

A cautionary caveat is in order. Three years ago I observed in this journal that the Ontario Superior Court of Justice's refusal to find that it was "plain and obvious" that the Indigenous Mayan Q'eqchi' plaintiffs' claim that Hudbay Minerals Inc. was directly negligent for failing to prevent human rights violations at its Fenix mining operation in Guatemala disclosed no reasonable cause of action was a small but crucial step toward greater corporate accountability.[37] Today, three years following the Court's dismissal of Hudbay's Rule 21 motion to strike, the case remains mired in the early stages of what is sure to be an expansive and expensive discovery process. *Nevsun* is likely to be just as complex, costly, and dilatory. The courts' development of an emergent transnational corporate law, without correspondingly progressive reforms and enforcement of civil procedure and evidence law, will prove wholly inadequate to the task of holding increasingly powerful transnational corporations accountable for their violations of human rights. Indeed, even under the best of circumstances, "litigation is a very clumsy tool of human rights enforcement."[38] Comprehensive law reform is necessary,[39] no mean feat in itself.[40] Besides compensation for a small number of victims, perhaps the ultimate result of *Nevsun* will be to at long last awaken lawmakers to the alleged atrocities committed abroad by some of its most prosperous corporations, which ought to shock the conscience of all Canadians in 2016.

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[35] *Nevsun, supra* note 1 at para 1 [emphasis added].
[36] *Ibid* at para 484.
[37] Jason MacLean, "One Small Step Toward Corporate Accountability: *Choc v. Hudbay Minerals Inc.*" (November 2013) Toronto Law Journal.
[38] Simons & Macklin, *supra* note 34 at 259.
[39] *Ibid* at ch 5.
[40] See e.g. Jason MacLean, Review of Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (New York: Routledge, 2014) (2016) 3:1 *The Extraction Industries and Society* 262.

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Administrative Tribunals – The "Jury Trials" of Corporate Law?[1]

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If a jury have not the right to judge between the government and those who disobey its laws, and resist its oppressions, the government is absolute, and the people, legally speaking, are slaves.

Lysander Spooner, *an Essay on the Trial by Jury*, 1852.

I. Introduction

One of the goals of the Canadian legal system is to regulate the conduct of individuals, businesses and the government within our society.[4] The image that often comes to mind is one of judges and juries in courtrooms. There can be no doubt that juries perform a fundamental role in the legal system. The fact that those accused of serious crimes have a constitutionally-entrenched right to be tried by a jury of their peers underscores the sanctity of the jury within our society.[5] The jury exists to "protect individuals' rights and to involve the community in the administration of justice," a societal obligation integral to the functioning of our legal system.[6]

Administrative tribunals play an equally important (and increasing) role in the administration of justice, by providing "a quick and efficient means of resolving disputes."[7] Although tribunals can take a variety of forms, they often perform judicial or quasi-judicial functions and have wide powers to also regulate the conduct of individuals; particularly in the capital markets.[8] Hearings before regulatory agencies are often adversarial in nature, much like a courtroom proceeding. Tribunals adjudicate questions regarding commercial or industrial matters, often impacting large areas of the economy under both federal and provincial regulatory oversight.[9] Adjudicative bodies like municipal boards, the Competition Tribunal,

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[4] *Practice Essentials for Administrative Tribunals*, Ombudsman Saskatchewan, at p. 11. Online: <https://www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guide_web-en-1.pdf>.
[5] Section 11(f) of the *Charter of Rights and Freedoms* requires that any person charged with an offence where penalty is five years' imprisonment or more has the right to a jury trial. See: Terry Skolnik, *The Jury System in Canada*, online: Juicio Por Jurados <http://www.sistemasjudiciales.org/content/jud/archivos/notaarchivo/947.pdf>.
[6] *Canadian Jury Duty*, online: Canadian Law Site < http://www.canadianlawsite.ca/jury-duty.htm>.
[7] *Practice Essentials for Administrative Tribunals*, supra note 4, at p. 13.
[8] Lisa Braverman, *Administrative Tribunals - a Legal Handbook*, (Aurora: Canada Law Book Inc., 2002), at p. 23.
[9] *Ibid*; *Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light*, online: Administrative Law Matters, at p. 19

the National Energy Board, and the provincial securities commissions are just a few examples of agencies that have been given the statutory power to decide questions relating to, among other things, individuals' rights to practise a particular livelihood, Canadian public policy, and what it means to act "in the public interest."[10]

Courts and tribunals play an "equally essential [role in] maintaining the rule of law in our complex, rapidly changing world."[11] What is less often discussed, however, and what this brief paper will examine, are the similarities between juries and administrative tribunals and how when we consider questions of cognitive bias, similar issues arise. We will focus on three areas: the hearing environment, the qualifications of the decision makers, and the principles that regulate their decision making. We conclude that administrative tribunals are the "juries" of corporate law and that lawyers and their clients would greatly benefit from applying many of the same forensic and advocacy skills to both.

II. The Hearing Environment

The decision-making process in administrative tribunals is similar to that of the regular courts. An administrative tribunal can be composed of a single decision maker or a panel of decision makers. While it is not uncommon for lawyers to sit on these panels, by their very nature, administrative tribunals are comprised of many, if not a majority, of lay people with no formal legal or judicial experience.

Like judges, lay members of administrative tribunals assess evidence, interpret the law and make decisions.[12] The chairperson is "typically responsible for leading the hearing process, making opening remarks, maintaining order in the hearing room and handling basic procedural matters," resembling the role of a judge in a jury trial.[13] Following the hearing, the chairperson will arrange a meeting with all of the members of the hearing panel, to "discuss the [issues] among themselves prior to making a decision," a task matching that of a jury deliberation.[14]

III. Decision Maker Qualifications

As described above, administrative tribunal panels are often comprised of individuals that are not "judges" in any real sense of the term. Decision makers may be individuals with "experience and expertise in areas other than law [with] an approach to the issues that is

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<http://www.administrativelawmatters.com/publications/best-practices-in-administrative-decision-making-viewing-the-copyright-board-of-canada-in-a-comparative-light>.
[10] *Ibid*.
[11] Beverley McLachlin, *Administrative Tribunals and the Courts: an Evolutionary Relationship*, online: Supreme Court of Canada <http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.
[12] *Practice Essentials for Administrative Tribunals*, supra note 4, at p. 13.
[13] *Ibid*, at p. 36.
[14] Robert W. Macaulay and James L.H. Sprague, *Hearings Before Administrative Tribunals*, 4th ed. (Toronto: Carswell, 2011), at pages 22.2(c)-22.2(d).

more sympathetic to the aims of the program than that often displayed by judges."[15] The decision makers are usually lay people with specialised expertise (unlike trial jury members) and they usually do not have an in-depth understanding of the law.

IV. The Principles of Natural Justice

In order to best ensure jury impartiality and overall fairness to the accused, Canada's jury system is "supported by juror eligibility requirements in provincial and territorial legislation" and by "numerous procedural mechanisms in the *Criminal Code*, notably by challenging and excusing jury members, sequestering jurors, and requiring unanimous jury verdicts."[16] Administrative tribunals have similar requirements of fairness: hearings must be "fair, impartial and appropriate in the specific circumstances of the case."[17] In fact, the principles of natural justice requiring a tribunal to be independent, disinterested and impartial are equally applicable to administrative and jury decision-making.[18] What we do not have in administrative hearings is the ability to choose a jury, or to assess a panel members' fitness to sit on a particular case. That is a discussion for another day, and whether the test for judicial bias is a sufficient safeguard is an issue for another paper.

Impartiality

Impartiality is a concept that is "fundamental to both individual and public confidence in the administration of justice."[19] In a jury setting, "even [the] potential [for] bias is contrary to our concept of trial fairness."[20] As was held by Mr. Justice Peter Cory in ***R v. Bain***,[21] apprehension of jury bias is to be avoided as the mere appearance of impartiality would be contrary to *Charter* principles.[22] The same requirements for fairness and impartiality are found in administrative tribunals. Reasonable apprehension of bias "is seen as relevant for administrative functions which are classified as adjudicative."[23]

At their core, both juries and administrative tribunals are composed of people who may make systematically erroneous decisions because of subjectivity and the way they think.[24] Biased

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[15] Evan Fox-Decent, *Judicial Review of Administrative Action*, online: LSA McGill University, at p. 11 <http://lsa.mcgill.ca/pubdocs/files/judicialreviewofadministrativeaction/317-fox_decent_judicialreviewofadministrativeaction_Winter2006.doc>.
[16] *The Jury System in Canada*, supra note 5.
[17] *Rules of Natural Justice*, online: Concordia University, at page 9 <https://www.concordia.ca/content/dam/common/docs/policies/official-policies/2011_Natural_Justice.pdf>.
[18] *Judicial Review of Administrative Action*, supra note 15, at page 63.
[19] *Criminal Jury System in Canada*, online: IPC < https://www.ipc.on.ca/site_documents/po-2826-chapter_3.0.pdf>.
[20] Lisa Silver, *Don't Pre-Judge! Jury Vetting and the Supreme Court of Canada*, online: Ideablawg <http://www.ideablawg.ca/blog/2012/3/7/dont-pre-judge-jury-vetting-and-the-supreme-court-of-canada.html>.
[21] [1992] 1 SCR 91 [*Bain*].
[22] *Bain, supra* note 21.
[23] Diana Ginn, *Recent Developments in Impartiality and Independence*, 11 CJALP 25.
[24] David Neuberger, *'Judge not, that ye be not judged': Judging Judicial Decision-Making*, F A Mann Lecture 2015, online: Supreme Court U.K. at para. 28 <https://www.supremecourt.uk/docs/speech-150129.pdf>.

decisions can "compromise the quality of justice that the court delivers."[25] It is for this reason that jurors and tribunal members alike are screened and may be removed if a potential for bias is found to exist. The importance of an impartial jury is supported by the right to challenge and excuse jury members. In the case of administrative tribunals, once an inquiry is commenced, the reviewing court tries to objectively assess whether an "impermissible degree" of bias may exist.[26] Decision makers found to be biased may be disqualified, or, if a judgment has already been made, it may be overturned or remitted before a different panel. This objective approach taken in the case of both juries and tribunals reflects the well-known axiom that "justice should not only be done but should manifestly and undoubtedly be seen to be done."[27]

Independence

Independence is an equally-important principle that guides a jury or administrative tribunal's decision making—it is of the utmost importance that each make a decision without the interference of third parties. Once a trial is completed, "the jury will arrive at its verdict in private."[28] From that point forward, "the jury members are not allowed to talk to anyone until a decision has been reached," the only exception being a judge and perhaps a court official.[29]

Similarly, the principle that "he who hears must decide" found in administrative tribunals is "applied so as to insulate the decision makers from the after-hearing influence of any non-agency person and any agency member who had not heard all of the evidence and argument in a matter."[30] As such, there should be no room for external influence or personal preference in decision making.[31] The decision maker's "lonely task is to determine facts from evidence and apply rules to those facts to resolve a dispute, or to find and consider a panoply of facts and exercise discretion in the public interest that will affect another's liberty or physical, emotional, or economic interest."[32]

Fundamentally, the principles that guide the decision-making process found in both jury trials and administrative tribunals are nearly identical, highlighting the importance of impartial and independent adjudicators in our legal system.

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[25] Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 Judicature 44 2002-2003, online: Cornell Law Library, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1733&context=facpub>.
[26] *Judicial Review of Administrative Action*, supra note 15, at page 62.
[27] *Recent Developments in Impartiality and Independence,* supra note 23.
[28] David M. Paciocco, *Understanding the Accusatorial System*, 14 CANCRIMLR 307.
[29] *The Role of the Jury*, online: Greg Monforton and Partners <http://www.gregmonforton.com/role-of-jury.html>.
[30] *Hearings Before Administrative Tribunals*, supra note 14, page 22.2(b).
[31] Carol Mahood Huddart, *Know Thyself: Some Thoughts about Impartiality of Administrative Decision-Makers from an Interested Observer*, 13 CJALP 147.
[32] *Ibid.*

V. Conclusion

We do not contend that administrative tribunals and jury trials are clones of each other. Courtrooms and tribunals are each established to carry out different roles within the legal system, performing alternative functions depending on the nature of the case. However, we believe that there are considerable parallels that can be drawn between the two; the way they make decisions, the characteristics of lay decision-makers and the principles that guide each's decision making. Those similarities should help guide us when we approach advocacy opportunities before administrative tribunals. A longer and more disciplined study of how lay administrative adjudicators affect the rights and privileges of all Canadians is long overdue.

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Toronto Law Journal

Case Analysis: *Shaw v. Loblaw Companies Limited*

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In *Shah v. Loblaw Companies Limited*, 2015 ONSC 5987, the Court determined that a legal costs protection insurance plan is only but one factor to consider in determining whether to order a plaintiff to pay security for costs into Court. It will depend on the circumstances of the case and the terms of the policy to be sure of the effect that such a policy will have on a security for costs analysis.

The Defendant, Loblaw, brought a motion for security for costs as the Plaintiff resided in India and had no assets in Ontario. The Plaintiff, Shah, obtained a BridgePoint Indemnity Company ("BICO") Legal Costs Protection Plan and asserted that this insurance policy was adequate security for costs.

Adverse costs protection insurance plans are somewhat new to Canada. BICO Legal Costs Protection Plans purport to provide access to justice for plaintiffs in "Canada's loser pays [justice] system." Essentially, the insurance plan covers a costs award if the Plaintiff is not successful at trial.

In his Endorsement, Justice Lemon considered the test for awarding security for costs. Rule 56.01(1) of the *Rules of Civil Procedure* sets out that the court, on a motion by the Defendant in a proceeding, may make such order for security for costs as is just where it appears that, among other things, the Plaintiff is ordinarily resident outside Ontario. Justice Lemon noted that the Plaintiff failed to show that he was impecunious. In rendering his decision, Justice Lemon also considered the merits of the case and made an order "as is just".

Justice Lemon went on to consider the effect of the adverse costs protection insurance plan on the analysis. In rendering his decision, Justice Lemon stated that although these insurance policies are a factor to consider in security for costs motions, "it will depend on the circumstances of the case and the terms of the policy to be sure of the effect that such a policy will have on the [security for costs] analysis." Justice Lemon considered the policy's various exceptions and exclusions raised by Loblaw; namely, insurance proceeds will not be paid if:

- the Plaintiff does not accept his counsel's recommendations to accept an offer to settle;
- the Plaintiff changes counsel and BridgePoint does not agree with the new counsel;
- the Plaintiff fails to advise of an adverse costs award within 15 days;

- the contingency fee agreement entered into between the Plaintiff and his counsel will not be materially amended during the pursuant of the Plaintiff's claim;
- the Plaintiff decides to represent himself;
- the Plaintiff fails to attend a defence medical;
- the Plaintiff fails or delays to provide instructions to or fails to cooperate with counsel; and
- the Plaintiff provides BridgePoint misleading information.

Justice Lemon agreed with Loblaw that the Defendant has no control over the above-noted exclusions and accordingly; the policy does not provide sufficient protection to the Defendant.

Interestingly, the subject adverse costs protection plan does not cover costs awarded as the result of a security for costs motion. In the end, Loblaw successfully argued that the BICO Legal Costs Protection Plan is not adequate security for costs.

Justice Lemon's decision sheds some much needed light on the effect of adverse costs protection insurance plans on security for costs motions.

Leave to appeal to the Divisional Court was denied.

Toronto Law Journal

It's Just a Matter of Time
Deadline Risks in the *Federal Courts Rules*

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There are nuances in Rules 6, 7, and 8 of the *Federal Courts Rules* that can catch lawyers by surprise, whether they practice principally in the Provincial Courts or are seasoned Federal Court practitioners.

The computation of time under the *Federal Courts Rules* are governed by sections 26 to 30 of the *Interpretation Act*, subject to sections 6(2) and 6(3) which deal with periods of less than seven days and the Christmas recess.[2] Extensions of time are dealt with under *Federal Courts Rules* 7 and 8.

As a first general caution, it should be noted that the provisions dealing with the computation, extension and abridgement of time under the *Federal Courts Rules* apply only to the *Rules* themselves and, where indicated, orders of the Court. The provisions cannot be relied on when computing time under other acts, including the *Federal Courts Act*.[3] For example, the timelines for filing a notice of appeal in the Registry of the Federal Court of Appeal do not fall within the scope of the *Rules* since they are set out in section 27(2) of the *Federal Courts Act*.[4]

At first glance, the rules dealing with the computation of time in the *Federal Courts Rules* appear very similar to the rules for Provincial Courts. However, there are subtle nuances that can result in missed deadlines. For comparison, reference will be made to the Ontario *Rules of Civil Procedure*.

Time between two events

The basic rule in the *Rules of Civil Procedure* is that a reference to a number of days between two events shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used.[5] In contrast, under section 27(1) of the *Interpretation Act*, where there is a reference to clear days or "at least" a number of days between two events, both days on which the events happen are excluded.[6] The *Interpretation Act* otherwise aligns when there is a reference to a number of days, not expressed to be clear days, between two

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[2] *Federal Courts Rules*, SOR/98-106 at Rule 6.
[3] See, for example, *Tucker v Canada* (2000), 193 FTR 81 at ¶10.
[4] *Federal Courts Act*, RSC 1985 c F-7 at s. 27(2).
[5] *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 3.01(1)(a).
[6] *Interpretation Act*, RSC 1985, c. I-21 at Rule 27(1).

events – the day on which the first event happens is excluded and the day on which the second event happens is included.[7]

This difference is significant, since deadlines in the *Federal Courts Rules* that are based on counting backwards from a future event are often expressed as "at least" a certain number of days before that future event. It is therefore necessary to add an extra day in calculating these deadlines compared to the *Rules of Civil Procedure*.

Holidays

In both the *Rules of Civil Procedure* and the *Federal Courts Rules*, a day that is a holiday is not included in computing the period for short period. However, there is a slight difference between what is considered a short period. In the *Rules of Civil Procedure,* holidays are not counted where a period of seven days or less is prescribed.[8] In the *Federal Courts Rules*, holidays are not included where a period of *less than seven days* is provided for.[9] This means a reference to "seven days" under the *Federal Courts Rules* means one week while under the *Rules of Civil Procedure,* "seven days" would exclude holidays.

To further compound the issue, what constitutes a "holiday" is slightly more complicated under the *Federal Courts Rules*.

The *Federal Courts Rules* defines a holiday as Saturday, Sunday or any other day defined as a holiday in subsection 35(1) of the *Interpretation Act*.[10] In addition to Federal holidays, section 35(1) of the *Interpretation Act* includes provincial public holidays in any provinces and civic holidays in any city, town, municipality or other organized district.[11]

Where parties are located in different provinces, different parties may have different holidays. Furthermore, since the Federal Court has registry offices across Canada, it raises the question of whether a document can be filed in a different province to obtain the benefit of that province's holidays.

Christmas Recess

Rule 6(3) of the *Federal Courts Rules* includes a special provision for the Christmas recess, which begins on December 21 in a year and ends on January 7 in the following year.[12] Under Rule 6(3), days that fall within the Christmas recess shall not be included in the computation of time for filing, amending or serving a document. Notably, Rule 6(3) does not appear to include the computation of time under an order of the Court.

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[7] *Interpretation Act*, RSC 1985, c. I-21 at Rule 27(2).
[8] *Rules of Civil Procedure,* RRO 1990, Reg 194 at Rule 3.01(1)(b).
[9] *Federal Courts Rules,* SOR/98-106 at Rule 6(2).
[10] *Federal Courts Rules,* SOR/98-106 at Rule 2, definition of "holiday".
[11] *Interpretation Act*, RSC 1985, c. I-21 at Rule 35(1).
[12] *Federal Courts Rules,* SOR/98-106 at Rules 6(3) and Rule 2, definition of "Christmas recess".

It is important to note that the Christmas recess is different from a holiday – whereas a deadline that falls within a holiday can be done on the day next following that is not a holiday, days that fall within the Christmas recess are fully excluded when computing time, thereby extending the deadline for a period equivalent to the full Christmas recess. For example, a deadline that would have fallen 2 days into the Christmas recess would be computed as 2 days after the Christmas recess. An interesting situation arises when the Christmas recess starts on a Monday, as it did in 2015. A deadline that falls on the weekend before the Christmas recess can be done on the day next following that is not a holiday according to section 27(2) of the *Interpretation Act*. In this case, Monday is part of the Christmas recess but it is not a holiday, so it is the day next following that is not a holiday. The question, then, is whether determining the "day next following" is considered a computation, in which case the deadline falls the first day after the Christmas recess, or whether the computation determines that the deadline falls on the weekend, in which case the act must be done that Monday.

One interesting effect of the scope of the Christmas recess provision is the interplay between the deadline for filing and the deadline for serving the notice of appeal. The deadline for filing a Notice of Appeal falls under section 27(2) of the *Federal Courts Act*, therefore the Christmas recess does not apply. Instead, in appeals (other than from an interlocutory judgment), section 27(2)(b) provides for a summer recess; days in July and August are not included in calculating the time.[13] The Christmas recess does apply to the time for service of the Notice of Appeal, since it falls under Rule 339 of the *Federal Courts Rules*. This means that any notice of appeal that needs to be filed during the Christmas recess will have the same deadline for service: within 10 days after the end of the Christmas recess.

Since Rule 6(3) states that days that fall within the Christmas recess "shall not be included" in the computation of time, it appears that a strict reading of this rule would indicate that timelines calculated based on counting backwards from a future event should also exclude the Christmas recess. For example, under Rule 348(1), a book of statutes, regulations and authorities in an appeal must be filed at least 30 days before the hearing date. If the hearing date is fixed less than 30 days after the Christmas recess, it may be necessary to exclude days that fall within the Christmas recess, moving the deadline earlier by up to 18 days.

Time for Service

There is also a minor difference regarding service of a document other than an originating process. Under the *Rules of Civil Procedure,* service after 4:00 p.m. or on a holiday is deemed to have been made on the next day that is not a holiday.[14] Rule 143(1) of the *Federal Courts Rules* is a little more generous, granting until 5:00 p.m. A note of caution, however, is to be cognizant of time differences when parties are located in different time zones, since time of service under the *Federal Courts Rules* is calculated based on the recipient's location.

[13] *Federal Courts Act*, RSC 1985 c F-7 at s. 27(2).
[14] *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 3.01(1)(d).

Extensions of Time

The *Federal Courts Rules* have a stricter regime for dealing with consent extensions of time than the *Rules of Civil Procedure*. Like the *Rules of Civil Procedure,* consent extensions can only be used for timelines prescribed by the Rules. Periods fixed by an order cannot be extended solely based on consent of the parties.[15] Furthermore, under the *Federal Courts Rules*, the period fixed for serving a statement of claim, a notice of application, or a notice of appeal cannot be extended on consent.

Unlike the *Rules of Civil Procedure,* under the *Federal Courts Rules* you can only seek a single consent extension to a given period, and the extension is limited to one half of the period sought to be extended.[16] Otherwise, unless the matter is case managed, it is necessary to bring a motion under rule 8 for an extension of time. Where a matter is case managed, the case management judge has the power to fix the period for completion of subsequent steps in the proceeding under rule 385(1)(b).

A motion under Rule 8 for an extension of time can only be sought with respect to deadlines provided by the *Rules* or fixed by an order. Rule 7 does not grant the Court jurisdiction to extend time limitations stipulated by statute.[17] It is therefore necessary to check the statute to determine whether the court has jurisdiction to extend a timeline.

In situations where an extension is being requested on consent, but the extension being requested is lengthier than the limit imposed by Rule 7, the Court may agree to issue an extension on consent without the need to serve and file a formal motion record. Rule 359 of the *Federal Courts Rules* allows the Court to grant leave to initiate a motion without a notice of motion. Rule 361(1) allows the court to dispense, by order, with the requirement for a motion record.[18] Rule 30(1)(a) allows a judge or prothonotary who is not sitting in court to make an order on motion if the judge or prothonotary is satisfied that all parties affected have consented thereto.[19]

Where it is likely that further extensions or further adjustments to the time set out in the *Federal Courts Rules* will be required, it may be most efficient to request issuance of a scheduling order instead of just granting an extension. Including a provision that allows for consent amendments to the schedule to be submitted to the court in writing jointly by the parties can help minimize the need for future motions on scheduling issues. This is often desirable in complex matters or matters that are in active settlement discussions.

Even when extensions are sought on consent, the granting of an extension under Rule 8 is not automatic. The Court maintains an important role ensuring that matters continue to proceed

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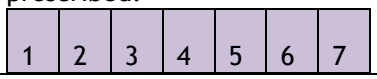
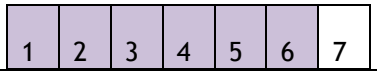
[15] *Rules of Civil Procedure,* RRO 1990, Reg 194 at Rule 3.02(4) refers only to time prescribed by the rules *Federal Courts Rules,* SOR/98-106 at Rule 7(3) explicitly excludes periods fixed by an order.
[16] *Federal Courts Rules,* SOR/98-106 at Rules 7(2).
[17] *Canada (Minister of Citizenship & Immigration) v Liu,* 2007 FCA 94 at ¶2.
[18] *Federal Courts Rules,* SOR/98-106 at Rule 364.
[19] *Federal Courts Rules,* SOR/98-106 at Rule 30(1)(a).

in a timely fashion. In *SmithKline Beecham Corp v Médicament*,[20] the Federal Court of Appeal noted its frustration at the parties' continued request for short 30 day extensions on consent. While the Court understood the parties' desire to avoid the costs involved in launching an appeal, it was not inclined to simply keep rubber stamping repeated requests for extensions of time. The Court concludes that it is prepared to defer to the parties' process for resolving their differences. However, the Court requests a timetable for the conclusion of negotiations and said that it would provide a single extension of time, sufficient to allow the parties to complete their negotiations. The extension would be peremptory in the sense that there would be no further extensions, absent exceptional circumstances.[21]

As can be seen, a seemingly mundane task – counting days – can be fraught with danger. Missing a deadline that cannot be extended on consent using Rule 7 or when the other party is unwilling to consent can result in delays and unnecessary expense as it will be necessary to seek an extension under Rule 8.

[20] 2004 FCA 441.
[21] *Ibid* at ¶4-6.

Computation of Time Quick Comparison Chart		
	Rules of Civil Procedure	***Federal Courts Rules***
Number of days between two events, not referred to as "clear days" or "at least"	Rule 3.01(1)(a) - exclude the day on which the first event happens and include the day on which the second event happens 	Rule 6(1) and *Interpretation Act* s. 27(2) - exclude the day on which the first event happens and include the day on which the second event happens 
Clear days or "at least" a number of days between two events	Rule 3.01(1)(a) - exclude the day on which the first event happens and include the day on which the second event happens 	Rule 6(1) and *Interpretation Act* s. 27(1) - both days on which the events happen are excluded 
Holidays	Rule 1.03(1) - any Saturday or Sunday, New Year's Day, Family Day, Good Friday, Easter Monday, Victoria Day, Canada Day, Civic Holiday, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day, and any special holiday proclaimed by the Governor General or Lieutenant Governor.	Rule 2 and *Interpretation Act* s. 35(1): (1) Any Saturday or Sunday; New Year's Day; Good Friday; Easter Monday; Christmas Day; the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign; Victoria Day; Canada Day; Labour Day; Remembrance Day; any day appointed by proclamation to be observed as a day of general prayer or mourning or day of public rejoicing or thanksgiving; (2) in any province, any day appointed by proclamation of the lieutenant governor of the province to be observed as a public holiday or as a day of general prayer or mourning or day of public rejoicing or thanksgiving within the province, and any day that is a non-juridical day by virtue of an Act of the legislature of the province, and (3) in any city, town, municipality or other organized district, any day appointed to be observed as a civic holiday;
Short period for which holidays are not included	3.01(1)(b) - seven days or less is prescribed. 	Rule 6(2) – less than seven days 

Computation of Time Quick Comparison Chart		
	Rules of Civil Procedure	***Federal Courts Rules***
Christmas recess	None	Rules 2 and 6(3) - days that fall within the Christmas recess (December 21- January 7) shall not be included in the computation of time for filing, amending or serving a document.
Time deadline for service of a document other than an originating process	Rule 3.01(1)(d) – 4:00 p.m	Rule 143(1) – 5 p.m.
Extensions of time on consent	Rule 3.04(2) – A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent	Rule 7 – A period provided by these Rules may be extended once by filing the consent in writing of all parties. The extension shall not exceed one half of the period sought to be extended. No extension may be made on consent of the parties in respect of a period fixed by an order of the Court or under subsection 203(1), 304(1) or 339(1) (service of a statement of claim, a notice of application, or a notice of appeal)